

CONTENTS

Features

- 7 We're Bankrupt....Now What?
Charles D. Sakai and Genevieve Ng
- 15 Addressing the Talent Challenge in Local Government:
The Silicon Valley Two-County Next Generation Task Force
Bob Bell and Donna Vaillancourt
- 21 Employee Directories and the Public Records Act:
Is an Agency Required to Disclose?
Nancy Clark

Recent Developments

Local Government

- 26 Reduction of State's Contribution to IHSS Wages
Invaded Collective Bargaining Process
- 27 Optional 'Donning and Doffing' at Police Station Is Not Compensable FLSA Work
- 29 Bankruptcy Bill Makes It Through Senate Local Government Committee
- 30 Deputy Coroners Not PERS 'Safety Members'

CONTENTS

Recent Developments

CONTINUED

Public Schools

- 33 The End of Layoffs by Seniority?
- 35 California Loses First Round of ‘Race to the Top,’ But Will Try Again
- 36 LAUSD Sued Over Teacher Layoffs
- 37 Bargaining Updates
- 41 Classified Employees Not Entitled to Pay for In-Service Days
- 42 Bill Would Require Signatures of Classified Employees
for Charter School Petition
- 42 Al Rodda: Father of Collective Bargaining for California’s Public Sector

Higher Education

- 45 Writ Overturning Administrative Decision
Not Necessary for CSU Whistleblowers
- 47 University Technical and Research Employees Win Three Years of Raises
- 50 CUE Battles Decertification Attempts

State Employment

- 52 DPA May Grant Supervisors Smaller Compensation Increases
Than Rank-and-File Correctional Officers
- 54 Statute Forbids Governor’s Furlough of State Compensation
Insurance Fund Attorneys
- 56 Prison Education Program Loses 570 Teachers

CONTENTS

Recent Developments

CONTINUED

Discrimination

- 59 Labor Code Sec. 233 Does Not Apply to Uncapped Sick Leave Policies
- 60 FMLA Front Pay Is an Equitable Remedy to Be Decided by the Court
- 62 California Fair Employment and Housing Commission
Proposes Amending Pregnancy Regulations

Public Sector Arbitration

- 63 Court May Vacate Award Where Arbitral Error
Forecloses Hearing on the Merits of FEHA Claim
- 65 Arbitrator’s Reinstatement of Laid-Off Grievant Did Not Exceed Her Powers
- 67 Arbitrator Imposes ‘Last Chance Agreement’

Departments

- 4 Letter From the Editor
- 69 Arbitration Log
- 74 Public Employment Relations Board Orders and Decisions
- 86 PERB Activity Reports

LETTER FROM THE EDITOR

Dear *CPER* Readers:

Lately, there has been some positive economic news on the national level. The number of new jobs has grown over the last two months and the stimulus package seems to be taking effect. In California, however, the economic picture has not brightened. As you well know (and as this issue of *CPER* attests), all segments of the public sector are struggling. Layoffs, furloughs, salary freezes, and cut backs are among the topics traversing the bargaining table. Whether fighting to protect jobs or to preserve public services, cities, counties, public schools, state government, and, yes, higher education all are confronting unprecedented funding cuts and revenue losses. *CPER* is no exception. Our funding from the university has been cut by over one-third.

To help get us through these challenging times, we are asking for financial support from all of you who rely on the *CPER* Program. A donation to “Friends of *CPER*” will help us continue to do our important work. We will move forward with new pocket guide titles, like the recently released *Pocket Guide to Just Cause: Discipline and Discharge Arbitration*. Through the pages of *CPER Journal*, we will continue to provide critical information that is so relevant to your job. At conferences and other educational programs, I’ll be there to share over 30 years of experience in the public sector labor relations field.

By making a contribution to “Friends of *CPER*,” you will help sustain our program and reinforce your commitment to our essential work. To join the generous law firms, employee organizations, professional associations, and individual supporters who are honored on the following page, go to the *CPER* website, <http://www.cper.berkeley.edu>, and click on “Donate,” or send a check payable to “Friends of *CPER*” to U.C. *CPER*-IRLE 2521 Channing Way, Berkeley, CA 94720-5555. Thanks for your support.

Sincerely,

A handwritten signature in black ink, reading "Carol Vendrillo". The signature is fluid and cursive, with a large loop at the end of the last name.

Carol Vendrillo
CPER Editor

Thank you FRIENDS OF *cper*

CPER would like to acknowledge the generous contributions from the following law firms, organizations, and individuals, the first of many we hope will support our program.

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NEW! NEW! NEW!

Cause or just cause for discipline or discharge is a requirement in most collective bargaining contracts and public sector personnel or civil service rules....But how is it defined?

Pocket Guide to Just Cause: Discipline and Discharge Arbitration

By Bonnie Bogue and Katherine Thomson, \$18

How do hearing officers and arbitrators assess whether discipline or discharge should be upheld? How should representatives for employers, unions, or employees prepare and present a disciplinary case?

The answers are in this Guide, which provides:

- A description of the “tests” that arbitrators apply to decide whether an employer had just cause for discipline or discharge.
- An explanation of how statutory law and collective bargaining agreements may limit the arbitrator’s traditional discretion.
- Advice to practitioners on how to evaluate a case, decide whether to settle a case, and if not, prepare for a hearing.
- Information on common remedies with an explanation of how statutory rights affect remedial awards.
- A description of the various statutory schemes that govern disciplinary hearing in different sectors of public employment in California.

The guide is generally applicable to both arbitrations and civil service disciplinary hearings. Designed for use by labor relations representatives, union representatives, and lawyers, it provides a breadth and depth of coverage not available elsewhere at such an affordable price.

To view the Table of Contents or to order this and other CPER publications, go to

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We're Bankrupt.... Now What?

Charles D. Sakai and Genevieve Ng



Charles D. Sakai, a founding partner of Renne Sloan Holtzman Sakai LLP, practices predominantly in the areas of traditional labor relations and attendant litigation. Genevieve Ng, an associate with the firm, focuses on labor and employment law. Both attorneys were involved in the post-bankruptcy negotiations with the labor unions in the City of Vallejo. They represent the city in the interest arbitration between the city and IBEW. The authors would like to thank Marc Levinson at Orrick Herrington Sutcliffe, bankruptcy counsel for the City of Vallejo, for his input into this article.

In May 2008, the City of Vallejo took the bold and controversial step of filing for protection under chapter 9 of the United States Bankruptcy Code. The charter city, located about forty-five miles northeast of San Francisco, had faced years of increasing general fund costs and decreasing revenues. For several years running, Vallejo's budget "suffered multi-million dollar deficits," and by the end of the 2007-08 fiscal year, its "reserves were exhausted."¹ The general fund deficit hovered at around \$17 million at the end of the 2007-08 fiscal year only to grow to \$22 million in the second quarter of the next fiscal year.²

Coupled with soaring labor costs — nearly 85 percent of its general-fund budget — sales tax, real property taxes, and other fees and taxes fell, producing a projected \$10 million budget deficit in fiscal year 2008-09.³ Unable to borrow from its restricted funds and unable to access private credit markets because of insufficient cash-flow, the city was technically insolvent (i.e., it would be unable to pay its general fund obligations in the coming fiscal year).⁴ With its May 23, 2008, declaration of bankruptcy, Vallejo became the most-populated U.S. city to file for chapter 9 protection.⁵ As Vallejo prepares to emerge from bankruptcy, its experience can provide lessons for other public agencies facing difficult fiscal shortfalls. This article examines municipal bankruptcy using the City of Vallejo as an illustrative case-study regarding the interplay between the federal Bankruptcy Code and state law, including the Meyers-Milias-Brown Act.

Municipal Bankruptcy Under Chapter 9 (Not Chapter 11)

Though chapter 11 has been used the most and has received the most bankruptcy press in recent years, with both the airline and automotive industries in the throes of reorganization, it is chapter 9 that is the focus of this article.

Chapter 11 provides for the reorganization of a corporation or a partnership, whereas chapter 9 applies solely to public agencies.⁶ A major distinction between a chapter 11 debtor and a chapter 9 debtor is that the operations of the former may be shuttered entirely and liquidated under chapter 7. Public agencies are not eligible for chapter 7 and generally do not have that luxury under state law.⁷

Congress enacted the first municipal bankruptcy legislation in 1934, during the Great Depression.⁸ Initially, this legislation was deemed an unconstitutional interference with states' immunity in violation of the 10th Amendment.⁹ Thereafter, Congress revised the law, and the Supreme Court upheld the basic framework of today's municipal bankruptcy scheme. Since 1938, fewer than 500 municipal bankruptcy petitions have been filed.¹⁰ The Bankruptcy Reform Act of 1994 produced the present version of chapter 9.¹¹

Chapter 9 differs significantly from chapter 11 in the amount of control the bankruptcy court exerts over the debtor. Section 904 limits the power of the bankruptcy court to interfere with the day-to-day activities and operations of the municipality.¹² For instance, a municipality may hire consultants and other professionals without the approval of the court, and the court only reviews these fees in the context of a plan of adjustment, where the court will only determine whether fees to be paid are reasonable.¹³

These limitations are necessary because municipal bankruptcy law must conform to the 10th Amendment¹⁴ and avoid the possibility that the federal government — through the bankruptcy court — will substitute its control over the affairs of the state and the elected officials of the municipality.¹⁵ Federal bankruptcy courts cannot interfere directly in the management or the operations of the municipality. As a consequence of these constitutional concerns, the bankruptcy court in a chapter 9 case is far less involved in the conduct and operations of the municipality than it is in a chapter 11 case. The municipality continues to maintain its ability to raise revenue where it is able, borrow money, and expend its resources as it deems appropriate.¹⁶

The Nuts and Bolts of Municipality Bankruptcy: Eligibility

Only municipalities may file for relief under chapter 9.¹⁷ Defined as a “political subdivision or public agency or instrumentality of the state,” the term “municipality” includes cities, counties, special districts, and school districts. Section 109(c) articulates four eligibility requirements. The entity:

- (1) Must specifically be authorized as a debtor by state law or by a governmental officer or organization empowered by state law to authorize the municipality to be a debtor;
- (2) Must be insolvent, as defined in 11 USC 101(32)(c);
- (3) Must desire to effect a plan to adjust its debts; and
- (4) Must:
 - a. Have obtained the agreement of creditors holding at least a majority of the claims of each class that such entity intends to impair under a plan;
 - b. Have negotiated in good faith with creditors and have failed to obtain the agreement of creditors holding at least a majority of the claims of each class that such entity intends to impair under a plan;
 - c. Be unable to negotiate with creditors because such negotiations are impracticable; or
 - d. Have reasonably believed that a creditor may attempt to obtain a transfer that is avoidable under section 547 of the Bankruptcy Code.

If a municipality is unable to meet any one of these four requirements, a bankruptcy court may dismiss the petition.¹⁸ Though structured in permissive language, bankruptcy courts have interpreted this language as mandatory.¹⁹ The municipality has the burden of proving it is eligible under these criteria.²⁰

After Vallejo filed for bankruptcy protection in May 2008, three of the four employee organizations as well as the city's other creditors quickly filed oppositions. The employee organizations were the Vallejo Police Officers Association (VPOA); the International Association of Fire Fighters, Local 1186 (IAFF); and the International Brotherhood of Electrical Workers, Local 2376 (IBEW). They contended that the city failed to meet the eligibility requirements under chapter 9.

Authorization to be a debtor. In California, Government Code Sec. 53760 authorizes municipal entities to file for bankruptcy relief.²¹

Insolvency. A municipality is insolvent if it is (1) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or (2) unable to pay its debts as they become due.²²

In *Vallejo*, the court determined on a cash-flow basis that city the could not pay its debts within the next fiscal year.²³ The unions argued that the city had sufficient funds to pay its debts and therefore was ineligible for bankruptcy protection. The unions attempted to support their argument by asserting the city's Comprehensive Annual Financial Report (CAFR) demonstrated the city had sufficient assets.²⁴ The court found the unions' argument unavailing, as the CAFR did not, and was not required to, show the city's liabilities; it provided only a partial picture of the city's financial situation. The unions also asserted that the city could have "siphoned money from certain funds to support its general fund."²⁵ Again, the court found this argument unpersuasive. The city's restricted funds — similar to the restricted and special funds of all other cities and counties — could not be plundered to prop up the general fund.²⁶

The unions also argued that the city could have avoided bankruptcy altogether by extending the modified memoranda of understanding with the unions and cutting discretionary spending on programs like "Meals on Wheels."²⁷ Again, the court found this argument unconvincing. The modified memoranda of understanding had "built in" wage increases of between 3 and 5 percent on top of deferred increases of up to 6.5 percent.²⁸ The city had previously slashed most of its discretionary spending on community-based programs, had ceased funding capital improvement projects, and had reduced city services.²⁹ At some point, "further funding reductions would threaten Vallejo's ability to provide for the basic health and safety of its citizens."³⁰ Based on all of

these factors, the court found that the city could not avoid the deficits faced in fiscal year 2008-09 and pay its debts, making it eligible for bankruptcy relief under chapter 9.

Desire for a plan to adjust debts. The municipality "must desire to effect a plan to adjust its debts."³¹ The courts have not extensively interpreted this requirement. Municipalities have demonstrated this desire by providing courts with a draft plan of adjustment and with comprehensive settlement agreements, which evinced movement towards resolving claims.³² The city filed an assertion of qualifications that

included a statement of the "City's desire to effect a plan to adjust its debts."³³ Additionally, the court found that the city continued to negotiate and engage in mediation with the unions up until a few days prior to filing for bankruptcy protection, and as the parties' interim agreements were expiring.³⁴ The court also found the city's post-petition pendency plans demonstrated a concerted effort towards an eventual plan of adjustment, meeting the criteria set forth in the provision.³⁵

Pre-bankruptcy negotiations.

One of the alternative requirements of 11 USC Sec. 109(c)(5)(B) is that the municipality demonstrate it "has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority of the claims of each class that the municipality intends to impair under a plan...." The unions asserted the city did not meet this criterion because the city failed to discuss a plan to adjust its debts. Though the court did not find the city met with its creditors to discuss and obtain an agreement on a plan of adjustment, the city did satisfy the alternative requirement that such negotiations were impracticable.³⁶ Because the city's labor costs made up the largest portion of the city's budget, the city could not practically or meaningfully negotiate with retiree creditors. Nor could it negotiate with its largest institutional creditor, which refused to enter into a workout or plan discussions until some modicum of labor peace had been achieved. Based on the foregoing, the Bankruptcy Appellate Panel affirmed

*Chapter 9 differs
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chapter 11 in the
amount of control
the bankruptcy court
exerts over the estate
of the debtor.*

the bankruptcy court's finding that the city was eligible for bankruptcy protection under chapter 9.

The Nuts and Bolts of Municipal Bankruptcy: The Automatic Stay

The most immediate effect of filing a petition under chapter 9 is the stay against creditor collection efforts, which is triggered automatically. This stay stops all collection actions against the municipality.³⁷ More significantly, it operates to prohibit action against officers and residents of the municipality if a creditor seeks to enforce a claim.³⁸ The stay allows a municipality to "avoid financial and operational collapse, enabling it instead to continue to provide public services to residents and others while negotiating a plan of adjustment with its creditors."³⁹ However, the bankruptcy court may modify or terminate the stay if cause is demonstrated.⁴⁰

In Vallejo, the city used the automatic stay to avoid grievances filed by labor unions, and maintain changes made pursuant to a "pendency plan" adopted after the city had filed its motion for permission to reject the collective bargaining agreements.

The Nuts and Bolts of Municipal Bankruptcy: Ability to Reject Executory Contracts

The ability to reject executory contracts and unexpired leases is, perhaps, one of the more controversial aspects of municipal bankruptcy. It raises federal constitutional as well as state law concerns. But because the state authorizes municipalities to use chapter 9, the municipality may make use of the *full* provisions of the Bankruptcy Code.⁴¹ "California must accept chapter 9 in its totality; it cannot cherry pick what it likes while disregarding the rest."⁴² Chapter 9, essentially, allows municipalities to use the federal bankruptcy laws to impair contracts for the purpose of adjusting municipal debts.⁴³

In *NLRB v. Bildisco and Bildisco*, the U.S. Supreme Court held that an employer in chapter 11 could reject a collective bargaining agreement without committing an unfair labor practice — by showing that the agreement was burdensome, that the balancing of the equities favored rejection of the agreement, and that "efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution."⁴⁴ Provisions of the agreement cannot be selectively rejected, but must be rejected in their entirety.⁴⁵ The bankruptcy court should ensure that

the employer make reasonable efforts to negotiate voluntary modifications,⁴⁶ and should not intercede in the process until it is clear that the parties are unable to reach agreement and reorganization is jeopardized.⁴⁷ Once an agreement is rejected, it is "no longer immediately enforceable, and may never be enforceable again."⁴⁸ However, even if the agreement is not enforceable, it becomes the basis for the creation of claims.

Shortly after the *Bildisco* decision, Congress enacted 11 USC Sec. 1113, which reflects "Congressional displeasure with *Bildisco's* holding...."⁴⁹

Section 1113 imposes a procedural and substantive requirement that a debtor-in-possession must adhere to the terms of its collective bargaining agreements pending rejection.⁵⁰ Significantly, this provision was not incorporated in chapter 9.⁵¹ By virtue of Congress' non-incorporation of section 1113 into chapter 9, *Bildisco* continues to be the applicable standard for rejecting executory agreements in municipal bankruptcies.⁵²

Vallejo's Rejection of Its Labor Agreements

On June 17, 2008, the city filed a motion to reject all four of its collective bargaining agreements. Post-filing, the city continued to bargain with its unions. From September 2008 through February 2009, the city met individually in both formal negotiations and informal discussions with IAFF, IBEW, VPOA, and CAMP.

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In July 2008 and again in October 2009, the city implemented pendency plans that modified the agreements with its employees. These plans unilaterally reduced wages, eliminated minimum staffing requirements, and set up a deferred payment plan for employees separating from city service. By virtue of accrued vacation and other compensatory leaves, many of these employees were entitled to payments of tens of thousands of dollars totaling nearly \$4 million citywide.⁵³ Under the pendency plan, the city paid separating employees for vacation and other compensatory leave in the first of two payments, while the second payment — payable at a future date — was comprised of a sick leave cash-out.⁵⁴ This enabled the city to hang onto necessary cash during very tight fiscal times. The city's second pendency plan, implemented in October 2009, eliminated specialty pay for firefighters. And it reduced the city's contribution towards healthcare premiums from 100 percent of any plan chosen by the employee to 75 percent of the Kaiser Bay Area rate at each level of participation for both IBEW and IAFF bargaining unit members.⁵⁵

VPOA and CAMP reached agreements with the city in late-January 2009. These agreements addressed some of the costly structural issues for the city, namely eliminating minimum staffing language for VPOA, and eliminating wage increases and capping active healthcare costs for both units. Significantly, VPOA and CAMP settled their bankruptcy claims, which arose when the city unilaterally breached their agreements and implemented modifications under the pendency plans.

In February 2009, the bankruptcy court heard the motion to reject the unions' collective bargaining agreements. In light of the VPOA and CAHP settlements, only the agreements of IAFF and IBEW were subject to the motion, and the bankruptcy court permitted the city to reject both. The court concluded that a municipality in Chapter 9 could seek to reject a collective bargaining agreement under 11 USC section 365. Following *Bildisco*, the court ruled that the municipality must show that the agreement

burdens the estate, that after balancing the equities, the equities favored rejection of the agreement, and "reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution."⁵⁶ Before the court determined whether the city satisfied the legal requirements for rejection, however, it ordered the city, IAFF, and IBEW to participate in another round of mediation. The parties engaged in mediation during the summer of 2009 with a judge from the U.S. Bankruptcy Court for the District of Oregon. While the parties were unable to reach agreement on a new contract, the city and IAFF agreed to reject the IAFF agreement in exchange for expedited interest arbitration pursuant to the city charter.⁵⁷ On August 31, 2009, the bankruptcy court rejected IBEW's agreement as burdensome to the city under the standards set forth in *Bildisco*, concluding that absent rejection of the IBEW agreement, it was likely the city could emerge from bankruptcy.⁵⁸

Federal bankruptcy law does not provide a specific process for collective bargaining under bankruptcy. Instead, pursuant to *Bildisco*, applicable federal (or state) law controls the conduct of the parties at the bargaining table.⁵⁹

The city and IAFF engaged in five days of mediation and five days of hearing in early-January 2010. The arbitration hearing was continued to March 2010, but the parties continued informal discussions to attempt to settle. The parties reached agreement on March 23, 2010, thereby leaving the matter of the status of the rejected agreement unresolved.

The new IAFF agreement includes a two-tier pension benefit and calls on employees to contribute a portion of the employer's share of pension funding. Other significant provisions in the IAFF agreement include reduced and capped city contributions towards medical premiums and wage freezes for the term of the agreement. The agreement addresses other structural issues including the reduction of accrual rates for sick leave and holiday pay, and the

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elimination of citywide minimum staffing requirements. These changes provide the city with some necessary flexibility to manage its workforce. Critics of the agreement challenge the city's failure to modify pension benefits for existing employees and retirees. However, the California Government Code specifically provides that no contracting agency that is subject to the bankruptcy provisions of chapter 9 shall reject any contract or agreement between the agency and CalPERS.⁶⁰ While such a prohibition may not withstand a constitutional challenge, no court has yet interpreted it.

As of the date of this article, IBEW and the city have been unable to reach agreement through negotiations and began mediation and arbitration pursuant to the city charter on March 31, 2010.

Negotiations Under the Purview of Bankruptcy or the Meyers-Milias-Brown Act

As the law currently stands, once a municipality files a petition under chapter 9, it may unilaterally modify collective bargaining agreements.⁶¹ The court in *In re County of Orange* looked to state law to determine whether the county's actions were appropriate. Though the *County of Orange* court concluded that *Bildisco* applied in chapter 9 cases, the court was not persuaded that municipalities could unilaterally breach collective bargaining agreements without limitations; instead, it required a showing consistent with the fiscal emergency language in the California Supreme Court's decision in *Sonoma County Organization of Public Employees v. County of Sonoma*.⁶²

Unlike the court in *In re County of Orange*, the court in *Vallejo* dismissed this rationale finding that the imposition of state labor law onto 11 USC Sec. 365 would be unconstitutional.⁶³ Only the federal government is empowered to enact a uniform bankruptcy law.⁶⁴ "Incorporating state substantive law into chapter 9 to amend, modify or negate substantive provisions of chapter 9 would violate Congress' ability to enact uniform bankruptcy laws."⁶⁵ The Supremacy Clause invalidates state laws that "interfere with or are contrary to federal law."⁶⁶ Only

the federal government — not the states — may impair contracts.⁶⁷ Because Congress is provided the exclusive authority to enact 11 USC Sec. 365, state law is preempted. Rejecting the insertion of state law into the bankruptcy laws, the court concluded that inflexible and conflicting state law must yield to the purposes and the explicit provisions of the bankruptcy law.⁶⁸

Significantly, *Vallejo* is factually distinguishable from *County of Orange* because the city took great pains to negotiate with the unions both prior to and after filing its chapter 9 petition. The county unilaterally eliminated

employee seniority and grievance rights while instructing department heads to terminate employees.⁶⁹ Only after many months of negotiations and mediation did the city modify its agreements with its unions. Though the city could have outright rejected the agreements, the modifications it made were circumspect and principally aimed at controlling costs — deferring increases and ultimately reducing

wages, eliminating minimum staffing that generated tremendous overtime costs, and implementing a payment schedule to employees leaving city service. These economically driven modifications were substantially different from the modifications made by the County of Orange.

Neither *NLRB v. Bildisco and Bildisco* nor *In re City of Vallejo* eliminate the requirement that the parties meet and confer in an attempt to resolve disputes prior to unilateral modifications. As noted above, both in the eligibility phase and the rejection phase of chapter 9, there are clear requirements that the municipality engage its creditors — including its unions — in negotiations at all stages of the process. This requirement is found in the *Bildisco* decision: A municipality "should continue to try to negotiate with key creditors to avoid [bankruptcy], and it should carefully document what steps are taken to reach agreement."⁷⁰ Under the protection of the automatic stay in bankruptcy, any "unfair labor practice" with regard to negotiations is not heard by the Public Employment Relations Board, but is brought to the bankruptcy court as an adversary

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proceeding for a determination whether the disputes merit a modification or lifting of the stay.⁷¹

IBEW has appealed the bankruptcy court's rejection of its collective bargaining agreement to the U.S. District Court. Oral argument was heard on March 17. That decision may resolve the distinctions between the *Vallejo* and *Orange County* decisions.

Conclusion

As revenues continue to decline and expenditures continue to increase, municipalities are looking to Vallejo's instructive path and possibly contemplating bankruptcy for themselves. Some believe that bankruptcy is "the most effective tool in the drawer" for lowering costs, especially pension obligations.⁷² But bankruptcy is neither an easy nor an inexpensive option. Vallejo's bankruptcy thus far has cost the city approximately \$7 million.⁷³ Nor is it a popular option. State Senator Mark DeSaulnier sponsored Senate Bill 88, which would require that municipalities seek permission from the California Debt and Investment Advisory Commission to file for bankruptcy protection.⁷⁴ S.B. 88 is similar to Assembly Bill 155, which was pulled from the Senate when support waned.⁷⁵ Both bills are a reaction to the outcry by public labor unions incensed by the City of Vallejo's bankruptcy petition.⁷⁶ Local governments are strongly opposed to the bill. Bills like S.B. 88 and A.B. 155 are not new and not specific to California.⁷⁷

Commentators believe that many municipalities will contemplate how to address insolvency in the coming fiscal year. The question of bankruptcy will be raised in many jurisdictions. However, bankruptcy is no panacea. In addition to its cost, the disruption to a city's normal functioning should not be underestimated. In many cities, productive negotiations with labor unions and the city's ability to unilaterally implement changes pursuant to the MMBA may make bankruptcy unnecessary, limiting chapter 9's impact to cities with unexpected fiscal challenges or those, like Vallejo, that are restricted by minimum staffing provisions or mandatory interest arbitration. *

1 *In re City of Vallejo* (B.A.P. 9th Cir. 2009) 408 B.R. 280, 286.

2 *Id.*

3 *Id.*

4 *Id.*

5 Steven Greenhut, "Vallejo's Painful Lessons in Municipal Bankruptcy," *Wall Street Journal*, March 26, 2010.

6 U.S. Courts Bankruptcy Basics, found at <http://www.uscourts.gov/bankruptcy/basics/chapter9.html>. Last visited March 26, 2010. Individuals are eligible to use chapter 11, but they rarely do because it is designed for corporate entities.

7 While the specter of disincorporation remains a possibility in a municipal bankruptcy situation, it is a complicated and untested process.

8 U.S. Courts Bankruptcy Basics found at <http://www.uscourts.gov/bankruptcy/basics/chapter9.html>, *supra*.

9 *Ashton v. Cameron County Water Improvement Dist. No. 1* (1936) 298 U.S. 513.

10 U.S. Courts Bankruptcy Basics, *supra*.

11 Pub. L. No. 103-394, 108 stat. 4106 (1994). Prior to the City of Vallejo, the County of Orange's 1994 filing was the most significant municipal bankruptcy. At the time of filing, the county was the fifth most populous in the United States. *In re County of Orange* (Bankr. C.D. Cal. 1995) 179 B.R. 177, 179. For additional analysis of the County of Orange bankruptcy, see Frederick Tung, *After Orange County: Reforming California Municipal Bankruptcy Law*, 53 *Hastings L.J.* 885 (2002).

12 11 USC Sec. 904.

13 U.S. Courts Bankruptcy Basics, *supra*.

14 The Tenth Amendment of the Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. X.

15 U.S. Courts Bankruptcy Basics, *supra*.

16 11 USC Secs. 364, 901(a).

17 11 USC Sec. 109(c).

18 11 USC Sec. 921(c).

19 *In re County of Orange* (Bankr. C.D. Cal. 1995) 183 B.R. 594.

20 *In re Valley Health Sys.* (Bankr. C.D. Cal. 2008) 383 B.R. 156.

21 Gov. Code Sec. 53760 provides: "Except as otherwise provided by statute, a local public entity in this state may file a petition and exercise powers pursuant to applicable federal bankruptcy law."

22 11 USC Sec. 101(32)(c).

23 *In re City of Vallejo*, *supra*, 408 B.R. at 289-290.

24 *Id.* at 290-291.

25 *Id.* at 291.

26 *Id.* at 293.

27 *Id.* at 294.

28 *Id.*

29 *Id.*

30 *Id.*

31 11 USC Sec. 109(c)(4).

32 *In re Sullivan County Reg'l Refuse Disposal Dist.* (Bankr. D.N.H. 1994) 165 B.R. 60, 76 (draft of plan), and *In re County of Orange, supra*, 183 B.R. at 607 (settlement agreements).

33 *In re City of Vallejo, supra*, 408 B.R. at 296.

34 *Id.*

35 The city implemented a series of pendency plans, which reduced pay and benefits, but permitted the city to balance its budget.

36 11 USC Sec. 109(c)(5)(C).

37 11 USC Sec. 362(a), 901(a).

38 11 USC Sec. 922(a).

39 Frederick Tung, *After Orange County: Reforming California Municipal Bankruptcy Law, supra*, 53 Hasting L.J., at 893.

40 John Knox and Marc Levinson, *Municipal Bankruptcy: Avoiding and Using Chapter 9 in Times of Fiscal Distress*, Orrick Herrington and Sutcliffe LLP (2009).

41 *In re City of Vallejo* (Bankr. E.D. Cal. 2009) 403 B.R. 72, 76.

42 *In re County of Orange, supra*, 191 B.R. at 1021.

43 11 USC Sec. 365, made applicable to Chapter 9 by 11 USC Sec. 901(a).

44 *NLRB v. Bildisco and Bildisco* (1984) 465 U.S. 513, 521-522.

45 11 USC Sec. 365(a); see also *Stewart Title Guar. Co. v Old Republic Natl. Title Ins. Co.* (5th Cir. 1996) 83 F.3d 735, 741.

46 *NLRB v. Bildisco and Bildisco, supra*, 465 U.S. at 526.

47 *Id.*

48 *Id.* at 532. Indeed, once a motion for permission to reject the collective bargaining agreement is filed, the employer need not comply with the terms of the agreement and may make unilateral modifications to the terms and conditions of employment. However, it does so at its peril as the terms of the agreement will be binding if not rejected.

49 *In re County of Orange, supra*, 179 B.R. at 181 fn. 8.

50 *Id.*

51 *Id.*; see also *In re City of Vallejo, supra*, 403 B.R. 72.

52 Congress considered amending chapter 9 to include a requirement that a municipality exhaust state labor law procedures prior to rejecting a collective bargaining agreement. *In re County of Orange, supra*, 179 B.R. at 182-183. Congress did not enact the Municipal Employee Protection Amendments of 1991. H.R. 3949, 102nd Cong., 1st Sess. (1991) (its legislative goal was the "contemplated enact[ment of] a section 1113-like' statute for chapter 9.").

53 July 2008 and October 2009 City of Vallejo Pendency Plans.

54 *Id.*

55 *Id.*

56 *NLRB v. Bildisco and Bildisco, supra*, 465 U.S. at 526; see also *In re City of Vallejo, supra*, 403 B.R. 78.

57 City of Vallejo Charter Sec. 809.

58 *In re City of Vallejo* (Bankr. E.D. Ca. Aug. 31, 2009) No. 08-26813-A-9, on appeal (findings of facts and conclusions of law rejecting International Brotherhood of Electrical Workers collective bargaining agreement). IBEW appealed this decision, and Judge John Mendez of the United States District Court Eastern District of California heard oral argument on March 17, 2010. A decision is expected sometime this summer.

59 *NLRB v. Bildisco and Bildisco, supra*, 465 U.S. at 527.

60 Gov. Code Sec. 20487.

61 *In re City of Vallejo, supra*, 403 B.R. 77.

62 *Id.* at 183-184. *County of Sonoma* established the following four-pronged test: (1) a declared emergency must be based on an adequate factual foundation; (2) the agency's actions must be designed to protect a basic social interest and not benefit a particular individual; (3) the law must be appropriate for the emergency and obligation; and (4) the agency decision must be temporary and limited to the immediate exigency that caused the action.

63 *In re City of Vallejo, supra*, 403 BR 72, 76-77.

64 U.S. Const. art. 1, sec. 8, cl. 4.

65 Alan N. Resnick and Henry J. Sommers, eds. 15th ed., *Collier on Bankruptcy*, par. 903.01.

66 U.S. Const. art. VI, cl. 2; see also *Baker & Drake Inc. v. Pub. Serv. Comm'n of Nev.* (9th Cir. 1994) 35 F.3d 1348, 1352.

67 U.S. Const., art. VI; see also *Cont'l Illinois Nat'l Bank & Trust v. Chicago R.I. & P. Ry. Co.* (1935) 294 U.S. 648, 680-681.

68 *In re City of Vallejo, supra*, 403 B.R. at 77.

69 *In re County of Orange, supra*, 179 B.R. 180.

70 John Knox and Marc Levinson, *Municipal Bankruptcy: Avoiding and Using Chapter 9 in Times of Fiscal Distress, supra*, at 13

71 *Id.* at 9-10.

72 Steven Greenhut, "Vallejo's Painful Lessons in Municipal Bankruptcy," *supra*.

73 City of Vallejo Finance Department, "City of Vallejo, California Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 2008" available at: <http://www.ci.vallejo.ca.us/uploads/48/Comprehensive%20Annual%20Financial%20Report%20CAFR%20June%2030%202008.pdf>.

74 "SB 88 Rears Its Ugly Head Again," Vallejo Times Herald, September 19, 2009.

75 *Id.* A.B. 155 passed the Senate Local Government Committee in April 2010, and will pass the full Senate soon. What the governor will do is unclear.

76 *Id.*

77 See generally Frederick Tung, *After Orange County: Reforming California Municipal Bankruptcy Law, supra*, 53 Hasting L.J. 885.

Addressing the Talent Challenge in Local Government

The Silicon Valley Two-County Next Generation Task Force

Bob Bell and Donna Vaillancourt



Bob Bell is human resources director for Redwood City. **Donna Vaillancourt** is director of human resources for the County of San Mateo.

PEOPLE IN ALL sectors of the workforce are entering the demographic known as “aging,” and the current wave of retirements is expected to continue. With a higher percentage of older workers, the public sector is particularly vulnerable to this exodus. At the same time, competition for a new pool of qualified and talented workers is going to get fierce as job growth improves — the emerging global economy has moved the talent competition to an international stage¹ and, as individuals exit the labor force, there are fewer workers to replace them.²

In economically lean times and in the face of budget deficits, how do governmental agencies attract and develop top talent to their workforces? How do they collaboratively develop and encourage leaders?

To confront these issues in the Silicon Valley, public administrators from San Mateo and Santa Clara counties formed the Two-County Next Generation Task Force, under the direction of Dr. Frank Benest, former city manager of Palo Alto³ and advisor for the International City/County Management Association. The task force, comprised of city managers, human resource professionals, executives from workforce planning agencies, and college administrators, has taken a two-pronged approach to its mission: to attract individuals to local government work and to accelerate the development of emerging leaders in local agencies.

Prong One: Attracting Individuals to Local Government Work

The group identified three core areas designed to draw talent:

- (1) Improve the image of government work and enhance the brand image of careers in local government.
- (2) Develop partnerships with key stakeholders in meeting their workforce training needs.

- (3) Work more collaboratively on programs that will bring individuals into local government work.

Subcommittees developed objectives and initiatives around these areas. Each group was able to secure grants and funding that might not have been obtained if requested by an individual. Therefore, encouraging results have cost virtually nothing for the participating agencies.

Improve the image of government work. A branding subcommittee was charged with finding new and innovative ways to market public service. The group identified the most enticing aspects of local government careers: making a difference, building community, helping others, and working with community leaders. With funding from each of the two county's city managers associations, the group hired a marketing firm to develop a logo and branding message that captured the essence of local government careers. The message selected was "Careers in Local Government: Your World Starts Here," which grasped the meaning of working locally to make a difference. It was accompanied by the logo, right.

The branding message is used in print recruitment materials, and is available in electronic format for agencies to use in their employment outreach efforts. To date, the materials have been distributed throughout California, the United States, and to a public agency in Canada.

Develop partnerships with key stakeholders. College students were identified as a major group of stakeholders. The subcommittee set out to validate what students wanted in a career and to test that the branding messages resonated with student job seekers. With grant money from the California section of the International City/County Management Association (Cal ICMA), the group retained a leading Bay Area research firm to design the survey. The research objectives were to:

- Understand how to attract the next generation of local government leaders;

- Survey the primary fields of study and career interests of students;
- Identify the sources from where students get career-related information and who they ask for advice;
- Assess the relative importance of different personal values and employment benefits in considering career choices;
- Gauge the impact of different messages on the students' likelihood of considering local government work;
- Identify differences in attitudes and behavior due to demographic and geographic variables.

The survey was conducted in the fall of 2008, with students from one local community college and two four-year institutions. The most common majors of survey participants included business, medical-related, and biological or physical science fields; others had majors in social sciences, computer technology, performance art, engineering, and government studies.

In terms of career paths, government work placed third, behind accounting/finance and medical-related occupations, on a list of 19 possibilities. This suggested that more outreach is needed to increase student awareness that local government employment can include work in those other occupations. Nonetheless, the overall message gleaned from the

survey is that students have an interest in occupations offered by local governments and are open to working in the public sector.

On the survey, students indicated that job websites are their primary source of career-related information. Also high on the list were college career centers and on-campus job postings, followed by employer websites and campus job fairs. Low on the list were newspaper ads, which once had been the main resource. Both upper- and lower-division students showed an interest in field-related internships.



Students were also asked to rate nine personal values and considerations that were evident when thinking about a career. Most important were benefits, healthcare, financial health of the employer, salary and bonuses, and vacation and paid holidays.

The next set of questions dealt specifically with the branding campaign. Students were presented with five reasons to pursue a career in local government and asked to indicate if each one made them more likely to pursue that type of career. These included phrases such as “Meaningful work that builds and improves communities,” and “Competitive salaries and better benefits than private sector.” Their ratings supported the task force’s branding and messaging themes. The findings also suggested that college career counselors be targeted to provide more comprehensive internship programs to local college students.

In July of 2008, the group conducted its first Career Counselor and Local Government Forum to build relationships with local area colleges and universities, and to create partnerships to address workforce needs. Representatives from over 15 schools heard stories from city managers and human resource professionals about the rewards of public service and how to enter the field of public administration. Additionally, counselors were given a guide that identified the range of occupations employed by local governments, ways for students to get their “foot in the door,” and professional contacts within local agencies. A second career counselor session was held in January 2010, and the relationships continue to expand.

Work more collaboratively on programs to bring individuals into local government. In the spirit of collaboration, local government agencies and career counselors joined together to work on college job fairs and internship opportunities. And, at a recent Stanford University career fair, agencies collaborated to develop marketing packets that better branded government service. At job fairs, instead of each city or county having individual

booths staffed by human resources professionals, agencies began attending fairs together with employee representatives from different occupational groups: engineering, finance, law, planning, and library services. Students were able to hear the career stories of local government employees first-hand.

The group also collaborated on designing and implementing a regional internship program that began in the summer of 2009. Sixteen agencies offered opportunities to area college students. The group developed a collaborative marketing and recruitment campaign through CalOPPS, a public sector job board and applicant tracking system. Over 3,500 students applied for the 39 internship opportunities. To enhance the internship experience, four educational sessions were included on topics ranging from “Why Chose a Career in Local Government” to “Leadership & Values of Public v. Private Organizations.” City and

county managers, assistant city managers, and human resource professionals conducted the sessions. The regional internship program has been launched again for the summer of 2010, expanding to 89 internship opportunities to date with 3,911 applicants in the first six weeks of posting.

Prong Two: Accelerate the Development of Emerging Leaders in Local Agencies

In addition to attracting people to local government work, the task force focused on internal initiatives to promote learning and accelerate the development of leaders within their organizations. Many of the initiatives are based on concepts from an experiential learning model⁴ developed by David A. Kolb, and defined in his 1984 book *Experiential Learning: Experience as the Source of Learning and Development*. His now famous model involves (1) concrete experience, followed by (2) observation, followed by (3) thinking, followed by (4) doing in new situations.

Local government agencies and career counselors joined together to work on job fairs and internship opportunities.

Three core programs described below were created to maximize experiential learning through on-the-job growth opportunities. They included the added support of coaching and professional network building. In addition to the programs, several agencies joined together as a consortium to create and conduct high-impact development programs for their employees.

Management Talent Exchange Program — a case of regional collaboration. The program began as an experiment involving an exchange of a few aspiring managers between a small group of cities in San Mateo and Santa Clara counties. MTEP has significantly grown and now consists of 20 to 30 high-potential managers who are nominated by their organizations and “exchanged” annually between cities, counties, and special districts for 90-day special assignments. The assignments hone skills and encourage managers to contribute new ideas and best practices to their host organizations. This results in the accelerated development of aspiring managers who would not have been able to gain the level and scope of experience as quickly within their own organizations. Additional development opportunities are created for employees who “fill in” behind the MTEP participant.

Cal ICMA Coaching Program. This program prepares high-potential, mid-career professionals to move into senior management roles. It operates through a volunteer network of experienced local government executives and senior assistants who serve as coaches and mentors. Not only do aspiring leaders benefit from a wealth of experience and expertise, successful managers build relationships and help new managers navigate their careers. The program offers one-on-one coaching connections facilitated by the Cal ICMA website, along with free telephone panels, webinars, e-coaching, and invitations to networking and coaching events held throughout the year.

One informal series of events are the Speed Coaching and Networking Lunches, open to aspiring professionals interested in one-on-one coaching with key local government leaders. The format consists of five 10-minute coaching sessions intended as a low-risk way to get acquainted and network with other interested professionals. More than 116 senior managers and emerging leaders met at a recent lunch.

Tomorrow’s City/County Managers Forums. The Next Generation Task Force in conjunction with the City/County Managers Association of Santa Clara and San Mateo Counties sponsors conversation and networking events where current and former city and county managers share personal insights on topics such as their career paths; key ingredients for success; joys, rewards, and challenges; skills required for advancement; working with governing boards; and lessons learned. Local government managers on the cusp of becoming chief executives have the opportunity to network and gain knowledge that can help elevate them to the next level. To participate, individuals must complete an application and be nominated by the chief executive in their own organization.

San Mateo County Training and Development Consortium. Over the last 25 years, a number of informal training partnerships have been formed between the county organization, cities, nonprofit agencies, and special districts within San Mateo County. While these partnerships have been beneficial, the next step is to reduce duplication. Public agencies need to consolidate internal and external services within local geographic areas to benefit from economies of scale. Consequently, the Regional Training and Development Consortium for Public Agencies has formed to enable neighboring agencies to:

- Offer mandated and non-mandated programs at reduced costs to employees;
- Take advantage of more online programs;
- Improve enrollment and tracking of training participation;
- Improve collaboration and communication among member agencies;
- Create and sustain an environment for ongoing education;
- Continue the focus on succession planning and development;
- Improve budget forecasting for training needs.

Although member agencies have responsibility for the operation of the consortium, oversight and policy direction are provided by a governing body composed of a subcommittee of the local city and county managers

association along with human resource directors. A working committee composed of representative member agency staff is responsible for making recommendations to the governing body on issues including training programs and trainers, website design, degree and certificate programs, marketing strategies, needs analysis, and evaluation design and methods.

The flagship program of the consortium is the Public Sector Leadership Academy,⁵ which offers an opportunity to learn from those who lead in the community. All of the trainers are former or current city and county managers, or senior government managers. The PSLA leverages the experience of senior leaders for the benefit of potential leaders who are from multiple local agencies.

Eight sessions in a conversational format include case studies and lessons learned on topics such as public policy, community building, civic engagement, future trends, and leadership skills. Within 10 days of announcing PLSA, enrollment was full, underscoring the interest in learning from top leaders in the community.

Conclusion

Historically, government employers have offered training opportunities for employees to increase their skills in serving community and leading public agencies. Empirical and anecdotal research indicates that current and future generations of employees will look to their employers for personal growth and professional development opportunities as they assess their career decisions. Finding innovative ways to maintain a commitment to valued training and development programs, despite financial constraints, can provide government agencies with a talented pool of workers. In these challenging times, agencies must work collaboratively and innovatively to attract talented employees, continue development, and ensure talent flows into the leadership pipeline. If they do not, both public organizations and communities will suffer. *

References

- Bureau of Labor Statistics. (2008, July). "Older workers: Are there older people in the workplace?" at http://www.bls.gov/spotlight/2008/older_workers.
- Joregensen, B., & Taylor, P. (2007). "Employees, employers and the institution of work: The global competition for terrain in the ageing workforce agenda," *Foresight*, 10(1), 22-36.
- Kolb, D. A. (1984) *Experiential Learning*, Englewood Cliffs, NJ.: Prentice Hall.

- 1 Joregensen & Taylor, 2007.
- 2 Bureau of Labor Statistics, 2008.
- 3 Dr. Benest is also the International City/County Management Association senior advisor for Next Generations Initiatives and editor of "Preparing the Next Generation: A Guide for Current and Future Local Government Managers," which can be found at http://jobs.icma.org/documents/next_generation.cfm.
- 4 Although traditional classroom training remains useful in a variety of content areas, there are inherent limitations with respect to personal growth development because, in most cases, it is event-oriented. Consequently there is little opportunity for sustained observation, reflection, and doing, which supports real and consistent behavioral change.
- 5 Ed Everett, former city manager of Redwood City, was instrumental in designing the PLSA.

From the California Public Employee Relations Program

Pocket Guide to the Fair Labor Standards Act

2nd edition, July 2009

By Cathleen Williams and Edmund K. Brehl; revised by Brian Walter

Are you on top of the latest revisions to the Fair Labor Standards Act?

There have been important changes since 2004, when the Department of Labor amended the white-collar exemptions to modify both the salary basis test and the duties test.

Written specifically for public sector practitioners, the Pocket Guide focuses on the Act's impact in the public sector workplace and explains the complicated provisions of the law that have vexed public sector practitioners, like the "salary basis" test and deductions from pay and leave for partial-day absences.

The 2009 edition includes the Department of Labor's significant changes to overtime exemption regulations, addresses common issues regarding hours worked by public employees, and discusses recent legal developments in compensatory time off. Two recent court decisions have held that counties and charter cities are not subject to any state wage laws or wage orders.

Each chapter tackles a broad topic by providing a detailed discussion of the law's many applications in special workplace environments. For example, the chapter that covers overtime calculation begins by defining regular rate of pay and then considers the payment of bonuses, fluctuating workweeks, and alternative work periods for law enforcement and fire protection employees. Other chapters focus on record keeping requirements, hours of work, and "white collar" exemptions. In each case, detailed footnotes offer an in-depth discussion of the varied applications of the FLSA.

It is a valuable resource for all public sector workers as both a quick reference and training tool.

See the Table of Contents or order at

<http://cper.berkeley.edu>

Employee Directories and the Public Records Act: Is an Agency Required to Disclose?

Nancy Clark



Nancy Clark is a deputy in the Santa Clara County Counsel's office. Prior to joining the County Counsel's office, she worked in private practice as a labor and employment lawyer representing public agencies. This article was first published in the Public Law Journal, a quarterly publication of the Public Law Section of the State Bar of California, Fall 2009, Vol. 32, No. 4.

IN THE PAST YEAR, virtually every public agency in the state has received a Public Records Act request for its employee directory in both electronic and hard copy format. Some agencies are being asked to provide even more information, including the names of each employee's collective bargaining agent and gross salary.

Until recently, agencies often responded to such requests by citing the prohibitive cost of compiling the information. But sophisticated database technology is now standard and allows most agencies to prepare a directory — either electronic or hard copy — in a matter of hours, if not minutes. As a rule, however, agencies are reluctant to provide their directories for a number of reasons, including the concern that divulging such information will result in a proliferation of marketing and other non-business related contacts.

Can an agency refuse to provide a copy of its employee directory?

Under the California Public Records Act, a directory that identifies all agency employees by name, position, telephone number, workplace and email address is a public record that must be shared unless exempt from disclosure. Two exemptions could possibly apply: the exception for personnel and similar records contained under Government Code Sec. 6254(c), and the "catch-all" exemption under Sec. 6255.

Directory information most likely would not be exempt as a personnel record, as public employees have no reasonable expectation that their individual work numbers or email addresses will remain private. But, the directory could be exempt under the catch-all exemption because the disclosure of this record would provide little to no information on the conduct of the public's business, and because the public has a strong interest in limiting commercial and other non-governmental business-related contacts with agency employees.

The Employee Directory Is a Public Record That Must Be Disclosed Unless Exempt

Disclosure of public records is governed by the California Public Records Act set forth at Government Code Secs. 6250 et seq. The purpose of the act is “to ensure public access to vital information about the government’s conduct of its business.”¹ A public record under the CPRA is defined broadly as “any writing containing information relating to the conduct of the public’s business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.”²

The CPRA exempts from disclosure a number of categories of documents, the most relevant being (1) personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy materials under Section 6254(c); and (2) those under the catch-all exception of Sec. 6254, which allows a government agency to withhold records if it can demonstrate that, on the facts of a particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure.³ These exemptions from disclosure are to be narrowly construed.⁴

The burden of proof is on the proponent of non-disclosure, who must demonstrate a “clear overbalance” on the side of confidentiality.⁵ The purpose of the requesting party in seeking disclosure cannot be considered⁶ because once a public record is disclosed to the requesting party, it must be made available for inspection by the public in general.⁷

There can be little dispute that an employee directory created and maintained by a public agency is a public record since it is used by the agency to conduct the public’s business. Accordingly, the directory is a public record that must be disclosed unless it is a personnel or similar type file, or the agency can demonstrate that the public interest in disclosure is clearly outweighed by the public interest in non-disclosure.

An Employee Directory Would Most Likely Not Be Exempt as a Personnel or Similar File

As noted above, the CPRA exempts from disclosure personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of privacy. Thus, if the employee directory can be likened to a personnel or similar file, the disclosure of which would compromise substantial privacy interests, the directory is confidential.

There is no single definition of what constitutes “a personnel record or similar file.” But, the courts generally have recognized that type of information as “personal data, including results of examinations and evaluations of work performance,”⁸ and as “highly detailed information pertaining to employees, such as ‘where (an employee) was born, the names of his parents, where he has lived from time to time, his high school or other school records, results of examinations, evaluations of his work performance.’”⁹ One defining feature of all personnel records is that access is generally “drastically limited...only to supervisory personnel directly involved with the individual.”¹⁰

If there is a substantial individual privacy interest in the information such that disclosure would constitute a clearly unwarranted invasion of that person’s privacy, and the interest in disclosure does not outweigh this interest, the records are exempt from disclosure.¹¹

Because an employee generally does not have a substantial privacy interest in her work telephone number or email address, it is unlikely an employee directory would be deemed a personnel or similar file exempt from disclosure. Most employees are never given assurance that this data shall remain confidential, and, most agencies do not prohibit its release. Employee contact information often is available to anyone who has access to the intranet, and may be released by the employee or others for business or even personal reasons.

Many public agencies disclose employee contact information that already appears in public forums such as agency websites. An employee’s work address, phone number and

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email address are more likely to be viewed as “business” rather than “personal” data that can be used by an agency as it sees fit. One exception though is for employees who work in safety-sensitive positions, such as undercover police officers, whose identify should not be released.

The courts have consistently held that the substantial privacy interest in home addresses outweighs the public interest in disclosure. This is primarily for two reasons: the privacy of the home has been accorded special consideration in our constitution, laws and traditions,¹² and there is lack of information that can be gleaned about the public’s business by release of home addresses.¹³ But research shows no case discussing the relative privacy interests at stake with respect to public employee work contact information. At least one state, Indiana, expressly makes public employee contact information a public record.¹⁴

Public employees most likely do not have a reasonable expectation of privacy in their work contact data because, as noted above, it is not “personal” information protected by the right of privacy. Accordingly, it is unlikely that employee work addresses, phone numbers and email addresses would be considered to be a “personnel or similar file” exempt from disclosure under Sec. 6254(c).

Public Employee Directories May Be Protected From Disclosure if the Public Interest in Disclosure Is Clearly Outweighed by the Public Interest in Non-Disclosure

Even though the employee directory would most likely not be determined to be a “personnel or similar file,” it could nevertheless be exempt from disclosure under the catch-all exception set forth at Section 6255. By this provision, an agency may withhold records if it can demonstrate that the public interest served by not disclosing them clearly outweighs the public interest served by disclosure.¹⁵ When this exemption is invoked, the courts will undertake a balancing

test and assess whether “on the facts of a particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure.”¹⁶

The mere fact that a record pertains to the conduct of the people’s business means that there is an interest in disclosure. The weight of that interest though is proportionate to the gravity of government tasks to be illuminated and the directness with which the disclosure will serve to illuminate.¹⁷ In other words, a court will examine whether disclosure would contribute significantly to public understanding of government activities.¹⁸

At first it seems obvious that the public has a substantial interest in being able to directly contact its public employees. After all, these employees are conducting the public’s business and the public has a right to obtain information related to it. Members of the public may have specific problems they need resolved and specific employees they need to contact.

However, a strong argument can be made that the public’s interest in obtaining the name, phone number, and email address for every employee will not further the public’s knowledge of agency activities in any significant or substantial way. As noted by the court in a number of cases, in reviewing the public interest in disclosure, the court is to consider the “gravity of the public tasks to be illuminated and the directness with which the disclosure will serve to illuminate.”¹⁹

The courts have consistently held that disclosure of home addresses and phone numbers of public employees is only marginally useful in uncovering “what the government is up to.”²⁰ Public interest in disclosure of such information has been held to be minimal even when the requester asserts that personal contact is necessary to confirm government compliance with mandatory duties, where the requestor has alternative, less intrusive means of obtaining the information sought.²¹

There is also the argument that information on practically all public issues may be obtained by contacting the

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relevant agency division, department, administrator, or governing board. Individual contact information is often provided where its release is necessary to facilitate service or alleviate a problem. In other words, it can be argued that the public's interest in contacting public employees is already met by the disclosure of general agency and departmental contact information. The availability of alternative methods of obtaining information can be a factor in analyzing the public's interest in disclosure, but, given the lack of privacy interests, the weight that would be given to these alternative means is not readily known.²²

There also is a public interest in not disclosing this information. The public has an interest in having its local communications systems specifically reserved governmental purposes, as opposed to those that are commercial or other non-business related. There is an interest in information not being compromised as once it is disclosed, no conditions can be placed on its use. This means that the information could be used for commercial purposes, such as direct marketing to public employees. The public obviously has an interest in not having its public offices and employees met with unwanted solicitations and other non-work related distractions.

Similarly, since the vast majority of public employees are engaged in the delivery of services, the public has an interest in not having these services disrupted by telephone calls, emails, and other contacts for non-business related reasons. Some public employees work in sensitive positions where the release of their information could result in unwanted and unnecessary contacts by dissatisfied members of the public. While the public has an interest in making sure that employees perform their jobs satisfactorily, personal calls and contacts to the employees themselves (as opposed to their supervisor or department head) can be detrimental.

There may also be security reasons supporting non-disclosure, including the potential for threats. But, the potential of real security threats must be supported by evidence showing how release of the particular information could increase a specified risk.²³ "Mere assertion of possible endangerment does not 'clearly outweigh' the public interest in access to public records."²⁴

Conclusion

How a particular court would balance the public's interest in disclosure of the employee directory cannot be predicted with certainty. There is a good argument that the public's interest in disclosure is minimal at best as there are more direct and better ways of learning the agency's business, ways that are potentially less disruptive. There is no specific governmental task that can be clearly "illuminated" by disclosure of the employee directory. Most public employees are already accessible to the public via general departmental information. And, there is a public interest in maintaining an agency's communication systems for the purpose of conducting the public's business as opposed to commercial and other interests. While these are strong reasons in support of non-disclosure, it is unclear whether they would be viewed as sufficient to "demonstrate a clear overbalance on the side of confidentiality." *

- 1 *CBS, Inc. v. Block* (1986) 41 Cal.3d 646, 656.
- 2 Gov. Code Sec. 6252(e).
- 3 *CBS, supra*, 42 Cal.3d at p. 652.
- 4 Cal. Const., art. 1, Sec. 3, subd. (b), para. (2); *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1425, 44 Cal.Rptr.2d 532.
- 5 Gov. Code Sec. 6255; *Black Panther Party v. Keboe* (1974) 42 Cal.App.3d 645, 657.
- 6 Gov. Code Sec. 6257.5; *Connell v. Superior Court* (1997) 56 Cal.App.4th 601.
- 7 *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008.
- 8 *Versaci v. Superior Court* (2005) 127 Cal.App.4th 805.
- 9 *United States Dept. of State v. Washington Post Co.* (1982) 456 U.S. 595. The CPRA, with its privacy protection, is modeled on the federal Freedom of Information Act (FOIA) and the federal judicial construction of that statute is useful in construing the CPRA. *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008.
- 10 *Id.*, *Versaci v. Superior Court* (2005) 127 Cal.App.4th 805.
- 11 *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742.
- 12 *U.S. Department of Defense v. FLRA* (1994) 510 U.S. 487.

13 *Id.*, *Versaci v. Superior Court*, 127 Cal.App.4th at p. 820: “We must determine ‘the extent to which disclosure of the requested item of information will shed light on the public agency’s performance of its duty....’”

14 Indiana State and Local Code Sec. 4(b)(8).

15 *County of Santa Clara v. Superior Court* (2009) 170 Cal. App.4th 1301.

16 *Id.*, p. 17.

17 *Connell v. Superior Court* (1997) 56 Cal.App.4th at 616.

18 *County of Santa Clara v. Superior Court* (2009) 170 Cal. App.4th 1301, citing *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008.

19 *Id.*

20 *Painting Industry v. US Air Force* (9th Cir. 1994) 26 F.3d 1479, see also *Department of Defense v. FLRA* (1994) 510 US 487 (union not entitled to list of employee home addresses as disclo-

sure would not contribute substantially to public understanding of operations or activities of the government).

21 See *County of Santa Clara*, *supra* citing *City of San Jose v. Superior Court*, 74 Cal.App.4th at 1020 (“where disclosure of personal contact information is necessary to determine whether public officials have properly exercised their duties by refraining from the arbitrary exercise of official power, disclosure has been upheld”).

22 See *County of Santa Clara v. Superior Court*, *supra* (“[w]hile the availability of less intrusive means to obtain the information may be a factor in the analysis, particularly in privacy cases, the existence of alternatives does not wholly undermine the public interest in disclosure”).

23 *Connell v. Superior Court* (1997) 56 Cal.App.4th 601; *CBS, Inc. v. Block* (1986) 42 Cal.3d 646.

24 *County of Santa Clara*, *supra*.

Recent Developments

Local Government

Reduction of State's Contribution to IHSS Wages Invaded Collective Bargaining Process

THE NINTH Circuit Court of Appeals affirmed the injunction issued by District Court Judge Claudia Wilken that barred the state from reducing its contribution to the wages and benefits of In-Home Supportive Services providers. The appellate court agreed with the lower court that the reduction in the state's contribution directly influenced the wage rates negotiated in each county because it set the maximum payment the state would make toward wages and benefits. (For a complete summary of the district court's ruling, see *CPER* No. 197, pp. 23-24.)

The state's IHSS program is supported through a combination of federal, state, and county funds. The statute allows each county either to directly hire IHSS providers or to establish an entity separate from the county, which performs functions necessary to deliver IHSS services. Fifty-six of the state's fifty-eight counties chose the second option and operate using a nonprofit consortium or a public authority, which are considered the providers' employer for purposes of collective bargaining over wages, hours, and other terms and conditions of employment. The wages and benefits of providers are established through collective bargaining between the consortium or public

authority and the union that represents the providers.

In February 2009, the governor reduced the state's contribution to the providers' hourly rate. Under the former arrangement, the state was required to pay 65 percent of the non-federal portion of the hourly wage up to \$12.10. The governor dropped the hourly cap to \$10.10, meaning that the state was obligated to contribute 65 percent of \$10.10, not 65 percent of \$12.10. Once the state reduced its contribution rate, counties followed suit and reduced the hourly rate it paid the providers.

Defending its action, the state argued that the rate reduction did not eliminate collective bargaining as the method for setting wages and benefits. It left the rate-setting process up to the counties and providers through collective bargaining. The court disagreed. "By eliminating its portion of the non-federal share, the State injects *itself* into the collective bargaining process." The statutory cap the state set on its contribution "provides a powerful bargaining chip" during negotiations over wages and benefits, the court observed.

The court also rejected the state's argument that the collective bargain-

ing process is adequate to assure that the rates paid to IHSS providers are consistent with efficiency, economy, and quality of care. The IHSS providers and their bargaining representatives are not challenging the collectively bargained rates, the court explained, or the collective bargaining process as a method for setting those rates. What is under scrutiny is "the procedural adequacy of the legislature's decision to decrease its funding of those rates." This is "integral to the collective bargaining process," said the court, "because it directly impacts the amount at which rates will ultimately be set."

The state's reduction would have resulted in irreparable harm to the IHSS providers.

In support of this reasoning, the court pointed to the rate change requests submitted by two counties after receiving notice of the state's reduction in its participation rate. They expressly say that the decision to reduce the IHSS providers' hourly rate is due to the change in the state's participation rate. These rate changes demonstrate "that the amount the State determines it will contribute to IHSS providers' wages and benefits alters the amount counties are willing to pay IHSS providers for their services," said the court.

And, the state Department of Social Services explicitly invalidated its prior approval of the collectively bargained wage rates when it informed the U.S. Department of Health and Human Services that, as a result of the state's funding reduction, "the maximum wage participate level will be \$10.10 per hour."

The appellate court was unwilling to ignore the reimbursement levels to providers when determining whether payment is sufficient to access of quality service. While there were 14,000 IHSS providers listed in county registries *before* the cut in state funding

took effect, the court noted, there is "little to ensure sufficiency of access to quality services after a reduction in wages and benefits."

The Ninth Circuit also concluded that the state's reduction in its reimbursement rate would have resulted in irreparable harm to the IHSS providers had the district court not intervened and ordered injunctive relief. In that vein, the court added, "individuals' interests in sufficient access to health care trump the State's interest in balancing its budget." (*Dominguez et al. v. Schwarzenegger et al.* [9th Cir. 2010] 596 F.3d 1087.) *

the gear by family members, safety concerns about the performance of firearm checks at home, discomfort associated with wearing gear while commuting, and the increased risk of being identified as a police officer while off duty.

The city was not blind to these concerns. The officers have the option of suiting up at home or at work. Each officer is provided a locker at the police station, and facilities are available for the officers to don and doff their uniforms. Only motorcycle officers are required to don and doff their uniforms and gear at home.

The district court agreed with the city, and the officers appealed to the Ninth Circuit.

Optional 'Donning and Doffing' at Police Station Is Not Compensable FLSA Work

IS A POLICE OFFICER entitled to compensation under the Fair Labor Standards Act when donning and doffing his uniform? In *Bamonte v. City of Mesa*, a divided panel of the Ninth Circuit Court of Appeals announced that these activities are compensable where they are necessary to the principal work performed and carried out at work for the benefit of the employer. On the facts in this case, the court found that the officers are not required to put their uniforms on while at work. And, while the court acknowledged that there are logical reasons for not donning their uniforms at home, these concerns reflect officers' personal preferences rather than mandates.

Background

Like other municipalities, the City of Mesa requires its police officers to wear uniforms and carry related gear such as a service weapon, handcuffs, chemical spray, a baton, and a portable radio. The officers argued they were entitled to compensation for donning and doffing time because their uniforms and gear affected the performance of their duties by contributing to their command presence and promoting public safety.

Officers also explained that they preferred to don and doff their uniforms and equipment at the police station because of the risk of loss or theft at home, the potential access to

Court of Appeals

The appellate court's decision presents a thorough discussion of the law developed by the courts and the Department of Labor concerning compensable activities.

In *Steiner v. Mitchell* (1956) 350 U.S. 247, the Supreme Court has held that the time workers in a battery plant spent removing their clothing and showering at the end of their shifts was compensable because those activities were an integral and indispensable part of the job. In *Alvarez v. IBP, Inc.* (9th Cir. 2003) 339 F.3d 894, the Ninth Circuit applied *Steiner* and found that employees of a meat processing plant must be compensated for the time it takes to change into required specialized protective clothing. The *Alvarez*

court relied on the fact that donning and doffing the gear on the employer's premise was required by law, the company's rules, and the nature of the work.

Following *Alvarez*, the Ninth Circuit in *Ballaris v. Wacker Siltronic Corp.* (2004) 370 F.3d 901, 167 CPER 69, found that donning and doffing of uniforms at a silicon wafer manufacturing plant was compensable because the plant uniforms were required by the employer and were worn for the employer's benefit.

Contrary to the facts in *Steiner*, *Alvarez*, and *Ballaris*, the court in this case found that donning and doffing of uniforms and equipment at the City of Mesa police station is entirely optional.

"The officers have cited no law, rule or regulation mandating on-premises donning and doffing," said the court. And, unlike in the *Steiner*, *Alvarez*, and *Ballaris* cases, donning and doffing uniforms and equipment at the workplace inures solely to the benefit of the employees; on-premise donning and doffing conveys no benefit to the employer.

Responding to the dissenting opinion that police officers may be deterred from using protective gear, the Ninth Circuit found it "insulting to even suggest that professional law enforcement officers would compromise their safety or the safety of the public for the sake of a few dollars. As far as the record reflects, donning and doff-

ing of uniforms and protective gear in the City of Mesa have gone uncompensated to this day. Yet the record does not reflect that a single officer elected to forego donning protective gear due to a lack of compensation."

The Ninth Circuit also deferred to the Department of Labor regulations issued after its decision in *Alvarez* and *Ballaris*. The DOL memorandum provides that donning and doffing of required gear is within the continuous workday "only when the employer or the nature of the job mandates that it take place on the employer's premises." If employees have an option and the ability to change into required gear at home, then changing into that gear is not a principal activity, even when it

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We are always saying: "Let the Law take its Course,"
but what we really mean is: "Let the Law take OUR Course."

-- Will Roger, humorist

The Meyers-Milias-Brown Act governs labor-management relationships in California local government: cities, counties, and most special districts. This update from the last edition covers three years of Public Employment Relations Board and court rulings since jurisdiction over the MMBA was transferred to PERB; the Supreme Court ruling establishing a six-month limitations period for MMBA charges before PERB; changes in PERB doctrine including a return to the Board's pre-*Lake Elsinore* arbitration deferral standard and reinstatement of the doctrine of equitable tolling; new federal court developments in the constitutional rules governing agency fees, and more.

This booklet provides an easy-to-use, up-to-date resource for those who need the MMBA in a nutshell. It's a quick guide through the tangle of cases affecting local government employee relations and includes the full text of act, a glossary, table of cases, and index of terms.

Pocket Guide to the Meyers-Milias-Brown Act

By Bonnie Bogue, Carol Vendrillo, Marla Taylor and Eric Borgerson • 13th edition (2006) • \$15

<http://cper.berkeley.edu>

takes place at the workplace, the DOL regulation instructs.

The dissent criticized the majority for announcing a bright-line location-based rule that controls compensability. "Location is not in and of itself the controlling test." By limiting the discussion to the "on-premises" changing requirement, the dissent charged, "the majority narrows a many-factored test to a one-factor inquiry."

Here, on-premise donning and doffing conveys no benefit to the employer.

The dissent agreed with the majority that time spent donning and doffing police uniforms is not compensable because it is not necessary to their work. "Yes, the uniform connotes authority, but the long-sleeved shirt, tie, name-tag, trousers, socks, and authorized footwear do not assist the officers in making arrests, interviewing witnesses, or writing reports." In contrast, the time spent donning and doffing protective gear is compensable, reasoned the dissent, because it is indispensable to the task of policing, "and the flexibility surrounding where the gear may be donned and doffed cannot single-handedly alter that fact." (*Bamonte v. City of Mesa* [9th Cir. 2010] 598 F.3d 1217.) *

Bankruptcy Bill Makes It Through Senate Local Government Committee

A BILL AUTHORED BY Assembly Member Tony Mendoza (D-Norwalk) hopes to limit the ability of cities and counties to seek federal bankruptcy protection. The proposed legislation comes in response to the City of Vallejo's decision to file for bankruptcy in 2008. Labor unions and others are pushing for some state oversight that would regulate additional bankruptcy filings. Groups like the California Professional Firefighters lobbied for some form of independent oversight that would test the soundness of the bankruptcy option.

The bill, A.B. 155, would prohibit a local public entity from exercising its rights under chapter 9 of federal bankruptcy laws without the approval of the California Debt and Investment Advisory Commission. Currently, the commission provides assistance on debt issuance and public fund investments to public agencies. It is a nine-member commission made up of the state treasurer, the governor or the director of finance, the state controller, two local government finance officers, and two members of the state Assembly and Senate.

A local public entity must submit a request to the commission demonstrating that it is, or will be, unable to pay its debts, that it has exhausted all options to avoid bankruptcy, and that it has a specific plan for restoring the

public agency's financial soundness. The request also must itemize any creditors that may be impaired by potential bankruptcy filing.

The commission is charged with evaluating the request to determine if the local public agency has exhausted other remedies and taken sufficient steps to reduce the negative consequences of the bankruptcy. The bill requires the commission to take testimony at an open public hearing.

Labor unions are pushing for some state oversight.

If the commission approves a bankruptcy request, it can order the local entity to limit the relief exercised under the federal law. As a condition of approving the request, it can limit changes to a contract or prohibit the abrogation of contracts.

Proponents of the bill assert that the state has a compelling interest in ensuring the fiscal health of local governments and checking statewide repercussions of bankruptcy in terms of higher borrowing costs. State government should have an opportunity to consider whether bankruptcy is the best approach to the fiscal problem, a decision that should not be left to

the sole discretion of the local public entity, the bill's author contends. The state also has a compelling interest in ensuring the validity and enforcement of contracts negotiated through the collective bargaining process, the bill's analysis reads.

Critics of the legislation argue that the bill would undermine local officials' discretion in responding to a fiscal crisis. The principal benefit of

*Critics argue that
the bill would
undermine local
officials' discretion.*

federal bankruptcy protection, critics contend, is that it allows a local entity some breathing room to formulate a debt readjustment plan that is consistent with its fiscal interests and the priorities of the local community.

Last year, a similar bill stalled in the Senate Local Government Committee. However, a member of that committee who opposed the bill was replaced by Senator Mark DeSaulnier (D-Concord) and the bill passed out of committee.

Currently, six states — Connecticut, Kentucky, Louisiana, New Jersey, North Carolina, and Ohio — require some form of state approval before a local government can petition for Chapter 9 bankruptcy protection. Other states, like Iowa, Michigan, and

Montana, impose certain preconditions or gate-keeping functions that regulate bankruptcy filings.

Some observers have suggested that the legislature add a local government "override" provision to the

pending bill so that, under certain circumstances, a local entity still can file for bankruptcy if its petition is denied by the state's Debt and Investment Commission. *

Deputy Coroners Not PERS 'Safety Members'

THE RIVERSIDE Sheriffs Association was unsuccessful in its effort to gain law enforcement status for the deputy coroners employed by the Riverside County Sheriffs Department. The Court of Appeal concluded that the coroners' main function was to investigate the causes of death and that they were not *clearly* engaged in active law enforcement, as required by statute. Therefore, the coroners were not entitled to enhanced retirement benefits as safety members of the Public Employees Retirement System.

In 2005, the county's contract with PERS designated deputy coroners as miscellaneous members. That year, the Riverside Sheriffs Association requested that PERS reclassify the deputy coroners as local "safety members," who receive greater retirement benefits than miscellaneous members. The PERS Board of Administration denied that request because it concluded that the duties of deputy coroners did not clearly come within the scope of active law enforcement.

The association appealed that determination, and an administra-

tive law judge, after conducting a full evidentiary hearing, issued a proposed decision, denying the reclassification application. The PERS board adopted the ALJ's decision and the association brought suit in superior court to overturn the board's ruling. The trial court found that the principal function of the deputy coroners does not involve the

*Principal functions
must 'clearly come
within the scope
of active law
enforcement.'*

active investigation and suppression of crime or the arrest and detention of criminals. This prompted the association's appeal.

Government Code Sec. 20436(a) grants peace officer status to employees of a county sheriff's department only if their principal functions "*clearly* come within the scope of active law enforcement," the Court of Appeal

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Experience is a hard teacher because she gives the test first, and the lesson afterwards.

-- Vernon Sanders Law, baseball player

CPER's best-selling Pocket Guide provides a clear explanation of the protections relating to investigations and interrogations, self-incrimination, privacy rights, polygraph exams, searches, personnel files, and administrative appeals. The Guide includes summaries of key court decisions, the text of the act, a glossary of terms, and an index.

This Guide is a must for each and every peace officer and for those involved in internal affairs and discipline.

Pocket Guide to the Public Safety Officers Procedural Bill of Rights Act

By Cecil Marr and Diane Marchant (Updated by Dieter Dammeier) • 12th edition (2007) • \$16
<http://cper.berkeley.edu>

emphasized. In *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, the court announced that law enforcement duties refer to services normally performed by police — that is, active enforcement and suppression of crimes and the arrest and detention of criminals. In the *Crumpler* case, the court found that animal control officers whose principal duties involved the enforcement of state and local laws pertaining to the licensing, control, and maintenance of animals were engaged in active law enforcement “in a loose sense,” but were not performing police-type functions.

The court in *Neeley v. Board of Retirement* (1974) 36 Cal.App.3d 815 followed *Crumpler*, finding that identification technicians employed by the Fresno County sheriff's office who gathered and analyzed evidence were not safety members. They were

“technical, administrative, and support personnel for those officers who are on the firing line,” the *Neeley* court said.

The court also looked to *County of Sutter v. Board of Administration* (1989) 215 Cal.App.3d 1288. There, the court concluded that family support investigators employed by the district attorneys office were not safety officers because they were not engaged in active law enforcement.

Relying on these cases, the Court of Appeal held that deputy coroners did not qualify for safety member status because their principal duties do not clearly fall within the scope of active law enforcement. While sometimes exposed to hazardous conditions, the principal duties of the deputy coroners are to investigate the causes of death in unusual criminal and noncriminal cases. They do not chase or apprehend criminals or engage in

crime suppression, even though they may provide logistical support to law enforcement officers.

The court also cited the portion of Gov. Code Sec. 20436(a) that expressly excludes sheriff department employees who are only occasionally called on to engage in active law enforcement service. Consistent with the ALJ's factual findings, the court noted that the coroners rarely, if ever, are required to be first responders to a crime scene, engage in physical confrontations, search suspects, clear residences, engage in foot pursuits or high-speed chases, use weapons, or make arrests. Any involvement they may have with the perils of active crime fighting “is purely incidental to their job,” the court remarked.

The court cautioned that its decision was not meant to diminish the fact that the deputy coroners per-

form a valuable public service and are sometimes exposed to real dangers. The court explained that its task was to interpret the statute as written. If the association or the coroners want to change the law, the court added, “they may wish to take their case to the Legislature.” (*Riverside Sheriffs Assn. v. Board of Administration of the California public Employees Retirement System* [4-26-10] C061168 [3d Dist.] ___Cal.App.4th___, 2010 DJDAR 6068.) *

Public Schools

The End of Layoffs by Seniority?

LEGISLATION introduced in April with Governor Schwarzenegger's support would, if passed, substantially weaken teacher tenure and seniority rights. S.B. 955, sponsored by Senator Bob Huff (R-Diamond Bar) and approved by the state Senate Education Committee, would amend the Education Code to give final say over firing teachers to local school boards rather than the Commission on Professional Competence. It would also enable a district to lay off teachers based on its needs and teacher effectiveness, rather than on seniority, and eliminate other protections.

Currently, a district has through March 15 of the teacher's second year of probation to provide a notice of its decision whether to reelect the teacher for the next school year. The bill would extend the deadline to June 15.

Under existing law, a district is prohibited from giving a notice of dismissal or suspension to a permanent employee between May 15 and September 15. S.B. 955 would delete that requirement. Now, an employee who receives a notice may request a hearing conducted by the Commission on Professional Competence, which has the final decision. The bill would replace

the commission with an administrative law judge, whose decisions would be advisory only. The final decision would be left to the district. The requirement that a district place a teacher on paid leave during the termination process would be eliminated. Only if reinstated would the teacher be entitled to back pay, with interest.

Under the law as it stands now, layoff notices for the subsequent school year must be given by the district to certificated employees by May 15 and must state the reasons for the layoff. The employee can request a hearing to determine if there is cause for non-reemployment. S.B. 955 would eliminate both the notice requirement and the right to a hearing.

Under current law, with certain exceptions, districts are required to implement layoffs in order of seniority. The proposed legislation creates additional exceptions, including authorizing districts to terminate employees on the basis of performance evaluations. Seniority-based layoffs could be circumvented if the school where the teacher works is selected by the district for a reduction in force based on the needs of the educational program.

The bill would also allow districts and charter schools to assign, reassign, and transfer teachers and administrators based on effectiveness and subject matter needs, without regard to years of service. And, it would eliminate the right of permanent employees who are laid off to be offered substitute service by order of seniority in certain situations.

The proposed legislation reflects a growing concern about teacher quality.

The bill was introduced as an urgency measure to take effect immediately. It requires a two-thirds vote.

The proposed legislation reflects a growing concern in the state about teacher quality, exacerbated by budget cuts forcing massive layoffs. A number of recent developments, largely from Los Angeles, are cited in support of the bill.

In March, just a month before S.B. 955 was introduced, a task force of parents, teachers, and administrators appointed to investigate teacher effectiveness by the Los Angeles USD school board issued recommendations. They included the elimination of the Commission on Professional Performance, a halt to some seniority-based layoffs and staffing decisions based on seniority, and a term of up to four years

before granting tenure to teachers, instead of the current two years. The task force also recommended that teacher evaluators endorse tenure decisions, that teacher evaluations be revamped to include student test score data, and that high-performing teachers willing to work in hard-to-staff schools receive greater compensation.

A lawsuit filed in February against LAUSD and the state by the American Civil Liberties Union of Southern California and other public interest law firms alleges that layoffs based on seniority disproportionately affect poor and minority students because inner-city schools more often are staffed with newer teachers. (See story in this issue at pp. 36-37.)

A series of articles appearing in the *Los Angeles Times* has brought to light cases in Los Angeles and New York City where teachers removed from their positions spend years collecting full pay and benefits while their cases are being reviewed.

The New Teacher Project, a national nonprofit organization founded by teachers, issued a report in March advocating replacing “quality-blind” with “quality-based” layoffs for teachers. Based on a survey of 9,000 teachers conducted last spring in two urban areas, the group found that a majority of teachers at every experience level believe that factors other than length of service should be considered in layoff decisions. The full report is available

at http://www.tntp.org/files/TNTP_Smarter_Teacher_Layoffs_Mar10.pdf.

In order to compete for federal funds under President Obama’s “Race to the Top” competition, the state passed legislation earlier this year that would allow student achievement scores to be used to evaluate teachers and administrators and to make employment decisions, but only if the practice complies with local collective bargaining agreements. Those evaluating the state’s application found that the legislation and other changes made by the state did not go far enough. California was given a low score, making it ineligible for the first round of funding. (See stories at *CPER* No. 198, pp. 18-20 and in this issue at pp. 35-36.)

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Education is the ability to listen to almost anything without losing your temper or your self-confidence.

-- Robert Frost, poet

This edition — packed with five years of new legal developments — covers reinstatement of the doctrine of equitable tolling, PERB’s return to its pre-*Lake Elsinore* arbitration deferral policy, clarification of the rules regarding the establishment of a prima facie case, and an updated chapter on pertinent case law.

In one concise Pocket Guide are all the major decisions of the Public Employment Relations Board and the courts that interpret and apply the law. Plus, the Guide includes the history and complete text of the act, and a summary of PERB regulations. Arranged by topic, the EERA Pocket Guide covers arbitration of grievances, discrimination, scope of bargaining, protected activity, strikes and job actions, unilateral action, and more.

Pocket Guide to the Educational Employment Relations Act

By Bonnie Bogue, Carol Vendrillo, Dave Bowen and Eric Borgerson • 7th edition (2006) • \$15
<http://cper.berkeley.edu>

Teachers unions remain firmly opposed to all efforts to undermine seniority-based layoffs, including S.B. 955. They view it as an attack on due process and on protections from age discrimination and retaliation. Unions argue that seniority is an objective criterion, whereas judging the effectiveness of a teacher is subjective.

Fred Glass, communications director for the California Federation of Teachers, told *CPER* that CFT is opposed to the legislation. “S.B. 955 is an attempt to divert attention from

budget cuts the last two years — neighborhood schools are eliminating entire programs and teaching positions, and in some cases closing the doors for good.” CTA argues that the bill would “discourage college graduates from going into the teaching profession because it creates an unfair system with no due process rights” and “opens the door to arbitrary and discriminatory treatment of teachers.” It also calls the legislation “unnecessary” because “there is already a process to remove ineffective teachers.” It points out that under current law teachers can be fired “for any reason” during their first two years of employment and that, in their

third year, teachers have a right to a hearing before being laid off. “This process allows districts to consider student needs when making layoff decisions,” it says.

Whether this particular legislation becomes law or not, it is clear that, given the current economic crisis, the pressure to reform the layoff seniority system is growing. Approximately 22,000 California teachers received pink slips in March, and Secretary of Education Arne Duncan estimates that somewhere between 100,000 and 300,000 public school jobs will be lost this year nationwide, calling the situation an “education catastrophe.” *

A survey found teachers believe that factors other than length of service should be considered.

budget cuts and blame teachers for the fiscal and educational policy failures of the governor and the legislature,” he explained.

On its website, <http://www.cta.org>, the California Teachers Association calls S.B. 955 “an outrageous attack on teachers” that ignores the real problems facing our schools. “It’s outrageous that some lawmakers are scapegoating teachers during these tough economic times and robbing them of due process rights, while at the same time — because of \$17 billion in

California Loses First Round of ‘Race to the Top,’ But Will Try Again

CALIFORNIA’S application for “Race to the Top” funds was emphatically rejected by federal Department of Education judges, who ranked it 27th out of 41 contenders. (See full story on the initial application in *CPER* No. 198, pp. 18-20.) Reviewers pointed to a lack of buy-in by school districts and local teachers unions as the biggest single factor underlying the state’s poor showing. “Too many doubts are raised by only 46.5 percent of school districts signing up” for the program, wrote one of the five reviewers. “The lack of union buy-in at this stage raises serious concerns about the ability of the state to implement the Race to the

Top reforms,” wrote another, noting that only 26 percent of unions from participating districts signed on.

Only two states, Delaware and Tennessee, were awarded grants. They received \$100 million and \$500 million respectively. Both states focused their applications on teacher and principal effectiveness. Both gave administrators the power to remove poorly rated teachers regardless of tenure, provided cash incentives for teachers to work in “high-need” schools, and allowed for the use of student performance in teacher evaluations. “Perhaps most importantly,” said Education Secretary Arne Duncan, “every one of the

districts in Delaware and Tennessee is committed to implementing the reforms in Race to the Top, and they have the support of the state leaders as well as their unions.” Delaware had 100 percent union support, and Tennessee had 93 percent support.

Faced with a decision to go for some of the \$3.4 billion available in a second round of grants, state officials were not enthusiastic, believing they

Reviewers pointed to a lack of buy-in by school districts and local teachers unions.

would be unable to garner sufficient union participation to make the effort worthwhile. But, at the end of April, Duncan called Governor Schwarzenegger and asked that California stay in the running. After some consideration, a plan developed to submit an application on behalf of only six districts, with predominantly minority, low-income students, that are open to the reforms Duncan is requiring. Fresno, Long Beach, Los Angeles, San Francisco, Clovis, and Sanger will work with consultants funded by private foundations to prepare an application in time for the June 1 deadline.

The new application will have to address the weaknesses in the state’s

initial attempt. The districts will likely agree to a new system of teacher evaluations, compensation, and tenure that will include consideration of test scores. It is unknown whether the unions, in particular United Teachers of Los Angeles, will sign a memorandum of understanding accepting the reforms set out in the application. The union did not participate in the first application, and its leadership has expressed opposition to pay-for-performance proposals in the past. UTLA has come out against S.B. 955, pending legislation that would give districts the option of minimizing or eliminating seniority as a factor in

layoff and tenure decisions. (See full discussion of S.B. 955 at pp. 33-35 of this issue of CPER.)

Another factor to be considered is whether the State Board of Education will replace the state’s curriculum standards with common-core standards in math and English language arts favored by Duncan and President Obama. The board is scheduled to vote on the proposal in July. If the plan is rejected, the state will lose points in the Race to the Top, round two.

Other districts will be allowed to join, but only if they sign an MOU committing to the reforms. Winners will be announced in September. *

LAUSD Sued Over Teacher Layoffs

A CLASS ACTION lawsuit brought against the Los Angeles Unified School District and the State of California could change the way teachers are laid off in the state and carve out protections for schools serving the economically disadvantaged. The complaint, filed by the American Civil Liberties Union of Southern California, the Public Counsel Law Center, and the law firm of Morrison & Foerster, alleges that budget cuts and teacher layoffs are violating students’ constitutional right to a fair and equal education.

The suit was brought on behalf of students at three of the district’s lowest performing schools, Samuel Gompers Middle School in South Los Angeles, Edwin Markham Middle School

in Watts, and John Liechty Middle School in Pico-Union. Students at the three schools are almost exclusively minority. The plaintiffs contend that massive layoffs have devastated these and other poor performing schools because the newest teachers are assigned to them and, since layoffs are carried out by seniority, these teachers were the first to go. The suit claims that between one-half and three-quarters of the teachers at the three named campuses were laid off last year, while campuses in more affluent areas were not similarly affected. The laid-off teachers were replaced by rotating substitutes and by instructors who did not have the proper credentials.

The suit alleges that California law allows districts an exception to layoffs by seniority on the basis of need or if cuts disproportionately affect certain groups. The plaintiffs are asking the court to require the district to lay off teachers at those schools at the same or lower levels than at any other campuses in the district, and that district officials be barred from denying the schools sufficient financial resources to maintain a teaching staff.

Neither LAUSD nor state officials took issue with the lawsuit's claims, but argued that budget cuts tied their hands. District Superintendent Ramon C. Cortines said that layoffs

of thousands of teachers and other district employees will be unavoidable for the second year in a row because of the state's \$640 million budget deficit. "We need greater flexibility in determining how the District can keep our high-performing teachers," he said. "More importantly, this District needs adequate resources to keep more teachers in our classrooms."

Responding to Cortines' comments, Catherine Lhamon, director of impact litigation at the Public Counsel Law Center, said, "Our constitution demands that kids get an equal opportunity to learn. Traditional rules cannot trump the constitution." *

that district voters pass a new parcel tax to be used for wages and benefits for the OEA unit.

The union asked the district to resume bargaining based on the fact-finding report, but the board refused and unanimously voted to impose the district's last, best, and final offer, which included no enhancements to the pay scale or benefits package. It also allows for increases in class sizes and for the hiring of hourly workers, as opposed to contract teachers, for adult education programs.

The board refused the union's request to resume bargaining based on the factfinding report.

Bargaining Updates

Oakland USD

IN THE LAST issue, *CPER* reported that members of the Oakland Education Association overwhelmingly had voted to authorize their leadership to call a one-day strike if the factfinding procedure then ongoing did not result in an agreement. (See *CPER* No. 198, p. 25.)

The factfinding report was issued on April 13, 2010. It made a number of recommendations, including shortening the school year and specifying class-size limits. Regarding compensation, the report recommended that the district add a longevity step to the salary schedule for those with 30 years

of STRS service effective January 1, 2011, and for those with 28 years of service, a longevity step, effective January 1, 2012. The panel also said that the entire OEA unit should receive at least a 2 percent on-schedule increase effective January 1, 2012, and that 60 percent of any ongoing, unrestricted new state and federal funds received by the district be put into a pool in each of the next two school years to be spent on wages or class size/caseloads as OEA sees fit. The factfinder also suggested that the parties agree to mutually develop a plan and a goal of achieving parity in total compensation at the mid-point of other Alameda County districts. It also recommended

The union scheduled a strike for April 29, 2010. On April 27, the district asked the union to return to the bargaining table. During the last round of bargaining, the teachers were asking for a 15 percent pay raise. The district's position is that it cannot afford any increase in compensation. Union president Betty Olson-Jones said that she was glad that the administration wanted to bargain but was not hopeful. "Yes, we'll go back, but we're not going to go back and negotiate a zero percent raise," she said, calling for the

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It's not enough that we do our best; sometimes we have to do what's required.

-- Sir Winston Churchill, statesman

The right to procedural due process is one of the most significant constitutional guarantees provided to citizens in general and to public employees in particular. Its entitlement has been created by statute, charter, ordinance, and other local laws or enactments. This pocket guide provides an overview of due process in public sector employment to assist employees and their employers in understanding their respective rights and obligations.

The guide—required reading—explains who is protected, what actions are covered, what process is due, remedies for violations, and more. A section focuses on the due process rights afforded to several specific types of employees: state civil service, public officers, police officers, school district employees, and community college district employees. The Pocket Guide also includes a discussion of *Skelly* and other key cases on due process and the liberty interest.

Pocket Guide to Due Process in Public Employment

By Emi Uyehara • 1st edition (2005) • \$12

<http://cper.berkeley.edu>

strike to go forward. “Now is not the time to back down.”

The job action was a success from the union's point of view, with about 90 percent of teachers walking the picket lines and a substantial majority of the 38,000 students staying home. Other union members who were contractually obligated to work through the strike, including principals, clerks, technology staff, and custodians, did show up, but many supported the teachers in other ways. At one school, the principal and two vice principals donated one day of their combined salaries to the teachers, totaling more than \$1,000.

Another strike vote was held on May 3. One-quarter of the 2,800 members turned out to vote, with 75 percent of the ballots cast in favor of

authorizing the union to call a strike of up to 10 days. An indefinite strike must be approved by a council of representatives from each of the districts' 100-plus schools.

Oakland teachers are the lowest-paid of all their counterparts in Alameda County. Superintendent Tony Smith is one of the most highly paid administrators in the area, earning \$265,000, plus benefits.

Capistrano USD

As last reported, the Capistrano Unified School District and the Capistrano Unified Education Association were also awaiting a factfinding report. (See *CPER* No. 198, p. 25.) That report was issued on March 12 and recommended a five-day reduction in

the school year, a temporary increase in class size by two students, and a 1 percent reduction of wages, with a restoration clause.

After the union declined the district's invitation to mediation, preferring face-to-face negotiations, the board, by a vote of six to one, imposed a 10.1 percent pay cut for all teachers. Union members voted to authorize a strike, and teachers took to the picket lines on April 23. Parents and students supported their teachers by organizing a mass student sick-out on April 13. On the first day of the strike, only 39 percent of students came to class. About 220 regular classroom teachers, representing 12 percent of the teaching force, crossed the picket lines, joined by 600 substitutes.

The strike continued for two more school days until the parties came to a tentative agreement on the night of April 27. As reported on the union's website, the agreement provides for a three-year contract with two reopeners in the 2011-12 school year, restoration of salary and furlough days as revenues increase, and an increase in the cap for some health benefits. The freeze on step-and-column increases ends February 1, 2011. The agreement also provides for improved working conditions, including increasing the time available for teacher preparation and the addition of two personal necessity days. The parties also agreed that there would be no reprisals against any unit member who engaged in strike activities and that all unfair practice charges would be withdrawn. The district did not agree to restore the three student days to the 2009-10 calendar lost due to the strike, and teachers still will be taking a four-furlough-day cut in pay. The agreement had not been ratified as of *CPER* press time.

West Contra Costa County USD

CPER reported in its last issue that a tentative agreement between West Contra Costa County USD and United Teachers of Richmond had been approved by a slim margin and that only 25 percent of the members voted. It was also reported that many members criticized the vote, claiming that it had been called on very short notice and was held in remote locations. This followed a vote on a prior

tentative agreement that union leadership initially stated had been approved but, upon recount, was found to have been rejected. (See *CPER* No. 198, pp. 24-25.)

Since that time, the union president, Pixie Hayward Schickele, was recalled by 54 percent of union voters. The recall election came just weeks after a general election in which members voted in favor of Diane Brown for president over Hayward Schickele, whose term was to end in July. Union vice president Terri Jackson will serve as president until Brown takes office.

Sacramento City USD

The Sacramento City Unified School District is applying pressure to the Sacramento City Teachers Association to agree to concessions that it claims are necessary to reduce its projected \$30 million deficit. After informal talks broke down, the district unveiled its proposal for "give-backs" at a public board meeting in April. Superintendent Jonathan Raymond said that the district was "sunshining" its demand for concessions because doing so is a necessary precursor to declaring impasse.

The district's list of concessions includes three furlough days for a claimed savings of \$2.4 million; a pay raise freeze, saving \$2.5 million; elimination of health copay rebates, saving \$310,000; a rise in copays for doctor visits to \$15, saving \$1.2 million; an agreement that employees will pay health benefit increases in 2010-11,

saving \$1.085 million; and a reduction in health benefits for out-of-area retirees, saving \$750,000.

Raymond has said that, without the concessions, class sizes would increase and the district would be unable to rescind many of the 700 pink slips it sent to teachers in March — the same month that SCUSD was placed on the state's fiscal early-warning list.

Four other unions representing district employees have agreed to take three furlough days next year. However, three of the unions can reopen their contracts if the teachers union does not agree to the furlough days.

*Unions in the
LAUSD have
agreed to furlough
days to help close the
budget gap.*

SCTA has stated that it is not required to open its contract prior to its expiration in the summer of 2011. District lawyers contend that language in a 2008 tentative agreement allows them to open the contract before then.

Los Angeles USD

In contrast to the contentious situations in other California school districts, unions in the Los Angeles Unified School District have agreed to unpaid furlough days to help close

the district's huge budget gap and preserve jobs.

Two units of Service Employees International Union, Local 99, representing 20,000 cafeteria workers, bus drivers, and other employees, approved a measure last November providing that they take one furlough day a month from February through May. The furlough days are estimated to save the district about \$7.7 million. Earlier last year, about 1,100 bus drivers also represented by SEIU Local 99 agreed to six unpaid days off during this fiscal year.

Now, United Teachers of Los Angeles has entered into an agreement with the district providing that teachers will take five unpaid furlough days this academic year and seven the next, which will save the district about \$147 million and preserve 1,825 teaching

jobs and current class sizes. Almost 80 percent of the union members who cast votes approved of the tentative agreement, which was ratified by the board.

Administrators, represented by the Associated Administrators of Los Angeles, also agreed to the furlough days, with 90 percent of the votes in favor of ratification. In exchange, LAUSD agreed not to seek any additional pay cuts and to reinstate about 100 administrative positions that would have been eliminated.

San Diego USD

After two years of stalled negotiations, teachers in the San Diego Unified School District have agreed to a contract that includes five furlough days a year for the next two school years, for a savings to the district of

about \$15 million. Under the terms of the contract between the district and the San Diego Education Association, the furloughs will be cancelled if the district's fiscal situation improves. There are no changes in the salary schedule for the 2008-09 and 2009-10 school years, and teachers will receive a pay raise of 7.16 percent for the 2012-13 school year. Medical copayments will increase from \$5 to \$10. Nursing and counseling staffing levels are protected from immediate cuts. Class sizes are capped.

The union called the contract a "monumental victory." The district had been seeking pay cuts of up to 8 percent.

Furloughs, Furloughs, Furloughs

School employees in a number of smaller school districts throughout the

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Education is when you read the fine print. Experience is what you get if you don't.

-- Pete Seeger, folksinger

Certificated K-12 employees and representatives, and public school employers — including governing board members, human resources personnel, administrators, and their legal representatives — navigate the often-convoluted web of laws, cases, and regulations that govern or affect classification and job security rights of public school employees.

The guide cover such important topics as dismissal, suspension, leaves of absence, layoffs, pre-hearing and hearing procedures, the Commission on Professional Competence, the Commission on Teacher Credentialing, the credential revocation process, and more.

Pocket Guide to

K-12 Certificated Employee Classification and Dismissal

By Dale Brodsky • 1st edition (2004) • \$15

<http://cper.berkeley.edu>

state have agreed to unpaid days off in order to avoid or minimize layoffs. For example, teachers in the Pacific Grove Unified School District have agreed to two furlough days, and the district has rescinded all teacher layoff notices. Las Virgenes Unified School District and the Las Virgenes Educators Association have agreed to four furlough days this year, allowing the district to rescind almost all of the layoff notices issued in March. An additional eight furlough days will be taken in the 2010-11 school year. And, teachers in the Pleasanton Unified School District agreed to three furlough days this year and five in 2010-11.

SDEA called their contract a 'monumental victory.'

The Placentia-Yorba Linda Unified School District finally reached an agreement with its classified employees, after the union, the Placentia Yorba Linda California School Employees Association, had declared impasse and requested a state-appointed mediator. The agreement, approved by 97 percent of voting members, provides that, in exchange for 10 furlough days this school year, the district will not lay off additional support staff this year and will not lay off more than 5 percent of staff in 2010-11. The district reached a 10-day furlough agreement with its teachers in January. *

Classified Employees Not Entitled to Pay for In-Service Days

THE TORRANCE Unified School District did not violate the Education Code by failing to pay classified employees who did not work on two staff-development days, held the Second District Court of Appeal. In *California School Employees Assn. v. Torrance USD*, the court found that Ed. Code Sec. 45203 did not apply because students would not "otherwise have been in attendance" on those days.

The district provided 180 days of instruction to students in the 2006-07 school year. Teachers were paid for five additional days, including three staff-development days, known as in-service days, which were not state-wide or local school holidays. Three categories of classified employees — paraeducators, instructional assistants, and educational assistants-special education — were not paid for two of the in-service days.

The union took the position that the certificated employees should have received regular pay for those days according to Sec. 45203. It provides, "Notwithstanding the adoption of separate work schedules for the certificated and classified services, on any school day during which pupils would otherwise have been in attendance but are not and for which certificated personnel receive regular pay, classified personnel shall also receive regular

pay whether or not they are required to report for duty that day."

The court agreed with the district that the in-service days were not covered by the code section. It noted that the district needed to have 180 days of scheduled instruction to obtain state funding, which it did. "The staff development student-free days were *in addition to*, not in lieu of, the 180 days of instruction," it said. "These days thus were not school days 'during which pupils would otherwise have been in attendance,'" under the plain meaning of the statute, the court concluded.

The court found additional support for this construction in the broader statutory language and legislative history. It instructed that, in an opinion interpreting Sec. 45203's predecessor statute, the attorney general held that classified employees were entitled to be paid for local school holidays declared for certificated employees. This meant that many classified workers who normally worked during the Christmas and Easter recess periods would arguably be working on local holidays and entitled to time and one-half.

In reaction, the legislature amended the statute to provide that Christmas and Easter recess periods should not be considered holidays for classified employees. The amendments also gave districts the power to adopt

separate work schedules for certificated and classified employees, and to include the language in dispute in this case. The court concluded that the plain language of Sec. 45203, when read in the context of the legislative history, “indicates that the phrase ‘any school day during which pupils otherwise would be in attendance’ refers to days declared as *local school holidays*, such as Columbus Day or a day with severe climactic conditions, on which both students and teachers do not attend school.” If teachers receive regular pay for those days, then, according to the statute, classified employees should also be paid even if not required to report to work. “This provision does not apply to staff development student-free days scheduled by the district because these days are not *holidays*; they are days on which teachers work,” the court said.

The court rejected the district’s reliance on *California School Employees Assn. v. Azusa USD* (1984) 152 Cal. App.3d 580, 61 CPER 46, in which Division 2 of the Second Appellate District held that classified employees should be paid for six non-instruction days when they did not work because teachers were required to work and were paid. The court here declined to follow the holding in *Azusa* because the court in that case did not consider the context of the disputed language, and because it was not clear whether the six days at issue were in lieu of instruction days. (*California School Employees Assn. v. Torrance USD* [2010] 182 Cal.App.4th 1040.) *

Bill Would Require Signatures of Classified Employees for Charter School Petition

UNDER THE Charter Schools Act as it stands presently, before a charter petition can be submitted to a district’s governing board for consideration, it must be signed by a number of parents equivalent to at least one-half of the number of pupils that the petitioner estimates will enroll in the charter school after its first year of operation *or* by a number of teachers that is equivalent to at least one-half of the number of teachers that the petitioner estimates will be employed at the school during its first year. A.B. 2363, introduced by Assembly Member Anthony Mendoza (D-Norwalk), would require that a petition signed by teachers also be signed by not less than one-half of the number of classified employees

that the petitioner estimates will be employed by the school in its first year of operation.

A petition to convert an existing public school to a charter school must now have the signatures of not less than 50 percent of the permanent status teachers currently employed at the school to be converted before it can be submitted to the district’s governing board. Mendoza’s bill, if enacted, would require that the petition also be signed by not less than 50 percent of the classified employees currently employed at the school.

The measure passed the Assembly by a vote of 43 to 31 and, as of CPER press time, is pending in the Senate. *

Al Rodda: Father of Collective Bargaining for California’s Public Sector

FORMER STATE Senator Al Rodda, who, in 1975, introduced the Rodda Act, otherwise known as the Educational Employment Relations Act, died on April 3, 2010, at the age of 97. Rodda, a Democrat, represented Sacramento for 22 years, from 1958 to 1980.

The Rodda Act, or EERA, was the first true collective bargaining statute for California public school employees. The purpose of the act

was “to promote the improvement of personnel-management and employer-employee relations” within California’s K through 12 and community college public school systems. It recognized school employees’ right to exclusive representation by the organization of their choice and afforded them a voice in the formulation of school policy.

In 1961, the state enacted the first public sector employment relations

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I can't understand why people are frightened of new ideas. I'm frightened of the old ones.

-- John Cage, composer

It takes time and experience to understand the nuances of labor relations, but here's a start.

If you are a manager who has just been given an assignment that includes labor relations responsibility, or if you are a newly appointed union representative, you may be feeling a bit overwhelmed. It's easy to make mistakes, and there's pressure from both sides. This Pocket Guide will help you get your bearings and survive the initial stages of what can be a difficult, but rewarding, line of work.

This book will tell you...why we have public employee unions...state laws that regulate labor relations...the language of labor relations...what is in the typical contract...how to negotiate and administer labor agreements...how to handle grievances...what to do in arbitration and unfair practice hearings...how to handle agency shop arrangements...and how to cope with extraordinary situations (including downsizing and/or restructuring, work actions, and organizing drives).

Pocket Guide to the Basics of Labor Relations

By Rhonda Albey • 1st edition (2003) • \$12

<http://cper.berkeley.edu>

law. The George Brown Act primarily recognized the right of employees to participate in, and be represented by, employee organizations, and granted those organizations the right to meet and confer with the employer prior to action being taken on a matter affecting employment conditions.

The Winton Act, passed in 1965, was patterned after the Brown Act, but carved out a separate statutory scheme for public school employees and removed them from the Brown Act's coverage. Under the Winton Act, rival employee organizations representing certificated employees were proportionately represented in a negotiating council, through which all negotiations with public school employers took

place. Non-certificated employees, however, were allowed to negotiate through their representative directly with the district. The Winton Act was widely criticized because it purportedly gave a bargaining advantage to larger certificated employee organizations over rival organizations with fewer members who were negotiating with the same employer. It also came under fire because it discriminated between certificated and non-certificated employees with regard to the ability to negotiate directly with public school employers, and because the meet and confer system mandated by the statute was regarded as too weak.

The Winton Act was replaced by EERA, which conveys to both cer-

tificated and classified employees the right to choose and be represented by an exclusive representative of the bargaining unit. Certification of an organization as the exclusive representative is granted after an election or voluntary recognition. With its passage, teachers, for the first time, were given the power to negotiate the terms and conditions of their employment and enter into a written collective bargaining agreement with a school district. The act mandates good faith negotiations and an impasse resolution procedure that includes mediation and factfinding. It also bars both the public school employer and the employee organization from engaging in unfair practices, such as bargaining in bad

faith and retaliating for participation in union activities.

The Rodda Act was California's first comprehensive, private-sector-like collective bargaining law for public employees. It served as a model for later statutes covering state and higher education employees: the Dills Act and the Higher Education Employer-Employee Relations Act. When the legislature enacted EERA, it also created the Educational Employment Relations Board to administer the act. EERB was later renamed the Public Employment Relations Board. Its jurisdiction expanded over the next 35 years to cover other public employment relations statutes modeled after the Rodda Act as they were enacted or placed under its control. *

Higher Education

Writ Overturning Administrative Decision Not Necessary for CSU Whistleblowers

IF AN EMPLOYEE is not satisfied with the California State University's response to a whistleblower complaint, the employee may sue for damages. A unanimous Supreme Court in *Runyon v. Board of Trustees of the California State University* held that neither statutory language nor the administrative exhaustion doctrine requires a CSU whistleblower to ask a court to overturn an adverse administrative decision before suing for damages for retaliation. The court frequently referred to its reasoning in *State Board of Chiropractic Examiners v. Superior Court [Arbuckle]* (2009) 45 Cal.4th 963, 195 CPER 23, which addressed the same issues for state employee whistleblowers.

Whose Satisfaction?

Richard Runyon, a tenured professor, was a department chair at the CSU Long Beach campus until he was removed by Dean Luis Ma Calingo. In October 2004, Runyon filed a whistleblower complaint as provided by CSU regulations. He charged that he was removed from the chairmanship because he had complained that the dean was habitually absent. The campus investigator concluded that Runyon's disclosures were not protected by the California Whistleblower Protec-

tion Act, and that Calingo removed Runyon because he had not made adequate progress in an expected review of department curriculum. After Runyon responded to the investigator's report, the CSU vice chancellor determined that, although Runyon's disclosures were protected, Calingo's decision was not retaliatory but instead based on inadequate progress on the curriculum review.

Rather than petitioning a court to overturn CSU's adverse determination, Runyon filed a lawsuit for damages under the whistleblower act. The trial court and the Court of Appeal both ruled that the lawsuit should be dismissed because Runyon had not first overturned CSU's determination that retaliation did not occur. Both courts found that Runyon's case did not fall within an exception to the general rule that an adverse administrative decision must be overturned in court before suing for damages on the same claim. But they reached that conclusion for different reasons.

A provision of the whistleblower act allows an injured party to seek damages if CSU fails to reach a decision on the complaint within the time limits set by the university's regulations. It also states, "Nothing in this section is

intended to prohibit the injured party from seeking a remedy if the university has not satisfactorily addressed the complaint within 18 months." While the trial court decided that CSU had "satisfactorily addressed" Runyon's complaint because it issued its determination within 18 months, the Court of Appeal did not agree with that analysis. The appellate court reasoned, instead, that to "satisfactorily address"

Runyon had not first overturned CSU's determination that retaliation did not occur.

a complaint, CSU had to conduct a thorough investigation in good faith. It rejected Runyon's assertion that the phrase referred to the satisfaction of the employee.

The Supreme Court agreed with Runyon. "The only person referred to in the sentence is the injured party," the court said. "The person who will most obviously be either satisfied or dissatisfied by the way a complaint is addressed is the complainant. Thus the most natural reading of the sentence is that the complainant may bring an action for damages if CSU does not, within 18 months, address the complaint to his or her satisfaction."

The court rebuffed CSU's contention that it satisfactorily addresses a complaint as long as its investigation is not slipshod and it rectifies any wrongdoing it finds. The language does not say a court has to be satisfied with the way the case was processed, the court chided, and it says nothing about a good faith or careful investigation.

The court criticized a prior appellate court ruling that rejected out of hand the argument that a whistleblower could sue CSU merely because he was unhappy. In *Obton v. Board of Trustees of the California State University* (2007) 148 Cal.App.4th 749, 184 CPER 66, a lower court asserted that allowing a whistleblower to "overturn" a decision just because he is not satis-

fied would render administrative procedures meaningless. That analysis was based on faulty premises, the Supreme Court instructed. The employee cannot "overturn" an adverse decision, the court pointed out. The whistleblower still must prove his case in the separate lawsuit that is authorized by the statute.

As it did in *Arbuckle*, the court explained that an administrative procedure may lead to prompt and inexpensive resolution of disputes, even if the final administrative decision is not binding in a later lawsuit. There are nonbinding administrative adjudicatory procedures for wage and hour claims and mandatory attorney-client fee claims that the legislature believes

promote settlement, the court pointed out. In fact, the court emphasized, state employee whistleblowers are not bound by adverse findings, and may sue as long as a complaint was submitted and findings have been issued. The court's interpretation would merely recognize that CSU employees have the same right to sue as state employees.

To resolve any remaining ambiguity, however, the court examined the legislative history of the statute to discern lawmakers' intentions. The original bill had not included the sentence containing the "university has not satisfactorily addressed" prerequisite to a lawsuit. A whistleblower advocacy group, the University Plaintiffs Co-

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It is better to know some of the questions than all of the answers.

-- James Thurber, writer

The HEERA Pocket Guide provides an up-to-date and easy-to-use description of the rights and obligations conferred by the act that governs collective bargaining at the University of California and the California State University systems.

Included is the full text of the act, plus an easy-to-read explanation of how the law works, its history, and how it fits in with other labor relations laws. The Guide explains the enforcement procedures of the Public Employment Relations Board, analyzes all important PERB decisions and court cases (arranged by topic) that interpret and apply the law, and contains a useful index, glossary of terms, and table of cases.

Portable, readable, and affordable, the guide is valuable as both a current source of information and a training tool — for administrators, human resource and labor relations personnel, faculty, and union representatives and their members.

Pocket Guide to the Higher Education Employer-Employee Relations Act

By Carol Vendrillo, Ritu Ahuja and Carolyn Leary • 1st edition (2003) • \$15

<http://cper.berkeley.edu>

Op, complained that the legislation was inadequate to protect whistleblowers. It suggested an amendment allowing a lawsuit if the injured party has first filed a complaint of retaliation and “the university has failed to provide a remedy satisfactory to the injured party regarding that complaint within ____ months.” The present language was

*Judicial exhaustion
‘unduly restricts’ the
civil remedy that
the whistleblower
act provides.*

added a few weeks later and signed into law. The court found the difference in language was stylistic and not intended to change the meaning of the proposed phrase, “a remedy satisfactory to the injured party.” That interpretation of the statute, therefore, would allow Runyon to file his lawsuit because he was not satisfied with CSU’s findings.

Exhaustion Not Required

The judicial exhaustion doctrine requires that, once an administrative agency makes a quasi-judicial decision, a party must accept the decision or complete the administrative process by petitioning the court for a writ to overturn it. If not reversed, the quasi-judicial findings prevent a party from attempting to prove contrary facts, and may preclude a claim altogether.

Since CSU had determined there was no retaliation, Runyon would have been precluded from trying to prove retaliation.

The exhaustion rule is not applied, however, if it would be contrary to the intent of the legislature. The Supreme Court cited its decision in *Arbuckle*, where it found that “the bareness of the statutory language” indicated the legislature did not intend the State Personnel Board’s findings to preclude a whistleblower’s lawsuit. The language in the CSU provision is similar, the court observed. It recognizes the parallel administrative remedy but does not require the administrative findings be set aside by a writ before filing a lawsuit. The Supreme Court therefore found that application of the judicial exhaustion doctrine would be contrary to legislative intent.

The court reiterated its concern that judicial exhaustion “unduly restricts” the civil remedy that the whistleblower act provides. Because writ review is deferential to the agency’s findings, “in nearly every case an

adverse decision from [CSU] would leave the employee without the benefit of the damages remedy set forth in [the statute],” the court said, quoting *Arbuckle*. Such restricted availability would hardly serve the legislature’s purpose of protecting the employee’s right to report waste, fraud, and other malfeasance without fear of retaliation, the court observed.

Requiring exhaustion of the administrative complaint process without making the decision binding is not irrational, the court continued. An administrative investigation is more likely to produce early and inexpensive resolution of disputes than allowing a lawsuit without administrative exhaustion. The court disapproved *Obton* to the extent that it held a whistleblower could not sue for damages after completing administrative complaint and investigation procedures. (*Runyon v. Board of Trustees of the California State University* [5-3-10] Supreme Ct. S168950, __ Cal.4th __, 2010 DJDAR 6476.) *

University Technical and Research Employees Win Three Years of Raises

AFTER TWO YEARS of bargaining, the University of California and the University Professional and Technical Employees, CWA, reached agreement on five-year contracts for its researcher and technical employee units. Accord-

ing to UPTE, which represents over 9,000 research and technical employees at 10 campuses and 5 medical centers, salary increases it won will offset the furloughs that U.C. employees have endured since last September.

Strikes and Pickets

The parties began bargaining in March 2008. One of UPTE's priorities was to eliminate a contract waiver that allows the university to change the health plans, benefits levels, and employee contributions without bargaining, as long as other employee groups are provided the same benefits. While that waiver has been acceptable in the past, recent premium increases without commensurate raises have prompted the union to seek a more active role to protect health benefits. The union also was concerned about proposed increases to pension contributions and parking fees that reduce take-home pay.

Effective October 1, 2010, all unit members will receive a 2.5 percent cost-of-living increase.

UPTE also wanted to bring salaries closer to market pay and decouple them from state budget contingencies. In the past, the university has conditioned raises on obtaining sufficient funding increases from the state. But UPTE contends that link makes no sense when 85 percent of employees in the technical and researcher units are not paid with state funds. The grants that fund most research and technical employees contain escalator clauses for

cost-of-living raises of approximately 3 percent, and the medical centers are not constrained by cuts in state funding.

During bargaining, UPTE offered to extend the contract beyond its expiration date of June 30, 2008, in return for an agreement from U.C. to offer raises without state funding contingencies. The university declined the offer, and the contract expired as scheduled. Months of bargaining continued while UPTE presented proposals and U.C. offered no salary increases.

In January 2009, the death of a staff researcher in a laboratory fire gave new focus to health and safety provisions the union was demanding. In March, union members in Berkeley held a short strike and other campuses were picketed. U.C. for the first time offered raises, but took them off the table before the deadline it had set for acceptance. (See story in *CPER* No. 196, pp. 56-57.)

The union began to compile a list of unfair practices. According to the union, the university had bypassed UPTE with missives to employees about furloughs, laid off union bargainers, and increased transportation costs during bargaining. While U.C. had committed \$5.2 million toward health premium increases to avoid higher contributions from most of its employees, some researchers and technical employees had been moved from one contribution level to another, causing higher employee contributions

without union agreement. Employees make contributions based on where their salaries fall within four pay bands, with lowest-paid employees making the smallest contributions.

UPTE also was incensed by the university's use of temporary layoffs. Most of the employees in UPTE-represented units are grant-funded and not subject to furloughs. But UPTE would not agree to subject the remaining 15 percent of the two units to the sliding scale furloughs that have cut most U.C. employees' pay by 4 to 10 percent. Instead, several campuses selectively laid off researchers and technical employees for two weeks, saving an equivalent sum of money.

The union agreed that the university may begin increasing pension contributions.

The union filed unfair practice charges with the Public Employment Relations Board and walked off the job in September 2009. (See story in *CPER* No. 197, pp. 38-41.) When no progress was made at the bargaining table and the university continued to subject some employees to temporary layoffs, the union struck again for two days in November. The next week, PERB issued a complaint alleging that U.C. refused to bargain in good faith, cancelled bargaining sessions, made its wage offer contingent on state funding

and withdrew it prematurely, and engaged in direct dealing with employees while refusing to bargain over holidays and furloughs.

Raises and Pension Contributions

It was a surprise to the union when the university suddenly shifted position in February and offered raises. The university gained employee contributions for pensions and the right to implement reductions in work hours for employees due to the budget shortfall.

The new contract provides no retroactive compensation, although a \$1,000 lump sum will be paid to each unit member on July 1, 2010. Effective October 1, 2010, all unit members will receive a 2.5 percent cost-of-living increase. Those eligible for step increases will receive them January 1, 2011. Step increases boost pay about 2 percent. A 3 percent raise will occur in October 2011, and step increases will be effective January 1, 2012. Another 3 percent cost-of-living increase will be paid October 1, 2012, followed by a step increase in January 2013.

Wages will be offset, however, by increased benefit costs. UPTE agreed to a limited waiver of bargaining over health benefit contributions, carriers, and coverage as long as any changes apply to other employees, but not if there are major structural changes to benefits or the aggregate contribution increases exceed 18 percent for employees earning less than \$46,000 through December 2013. The union also negotiated caps on parking increases.

In a controversial move, the union agreed that the university may begin increasing pension contributions beginning July 1, 2011. Until April 15, 2010, employees had not made pension contributions for nearly two decades, due to a superfunded pension plan. That surplus began to dwindle in 2001, and was wiped out altogether in 2009. U.C. has been trying to convince employee unions to restart contributions for several years. (See story in *CPER* No. 181, pp. 42-44.) Effective April

A lengthy standoff on furloughs will now come to an end.

15, the university began redirecting contributions employees had been making into a defined contribution plan back into the retirement system for non-represented employees, service employees, nurses, and police officers.

In the new contract, UPTE agreed to the redirection of contributions. It also agreed to an additional 1 percent contribution July 1, 2011, and a second 1 percent increase on July 1, 2012, as long as other staff employees commit to pay increased contributions and the university matches the increase. As UPTE's Berkeley local leaders pointed out in a campaign to reject the tentative agreement, UPTE is the first union to agree to a potential 4 percent contribution rate.

UPTE retains the right to bargain over any changes to pension benefits. This provision may become very important in the near future. A Post-Employment Benefits Task Force appointed by the U.C. chancellor is considering making a recommendation that pension benefits be altered for both new hires and for current employees on a prospective basis, Academic Senate U.C. Faculty Welfare Committee member Robert Anderson told faculty at a forum on the Berkeley campus in April 2010.

U.C. agreed to report to the union any safety and health issues that it must make to state and federal agencies. The new contract also bans retaliation against employees for reporting health and safety concerns, and makes employees responsible for reporting unsafe working conditions. It allows released time for one safety and health steward on each campus.

A lengthy standoff on furloughs will now come to an end. In addition to contending that systemwide furloughs were not necessary for financial reasons, UPTE resisted furloughs over the last year because the university would not guarantee that furloughs would prevent layoffs. The union charged that the university instead subjected unit members to temporary layoffs designed to recoup the same amount of salary savings as furloughs would have produced.

The agreement provides that members subject to temporary layoffs for budget shortfall reasons will have the opportunity to enroll in the Staff

and Academic Reduction in Time program, which allows employees to accrue benefits at their regular rate while working reduced hours. A joint labor-management committee will identify resources available for laid-off employees. As part of the settlement, the union agreed to dismiss the unfair practice charge relating to the temporary layoffs.

Despite the pay raises in the agreement, the Berkeley local union advised its members to vote against ratification. The lack of retroactive raises will encourage U.C. to drag its feet in the next round of negotiations, the local argued. There is no protection against

temporary layoffs, which will amount to 20 percent pay cuts between now and the end of December 2010. And the union did not negotiate further layoff limits even though U.C. told negotiators that the raises will likely result in layoffs.

Although a majority of members of the Berkeley local union voted against the agreements, over 90 percent of the members systemwide ratified the new contract. UPTE president Jelger Kalmijn characterized the agreement as a landmark. "It locks down benefit contributions and wages. For the first time, future compensation is not conditioned on state funding." *

after a lengthy struggle and impasse procedures, AFSCME Local 3299 won a contract for U.C. service workers that guaranteed 10 percent raises over a three-year period.

Whether clerical employees approached AFSCME Local 3299 or the union made the first move, CUE suddenly learned in March that AFSCME was gathering authorization cards for a

The CUE executive board voted to affiliate with the International Brotherhood of Teamsters.

CUE Battles Decertification Attempts

CHANGE IS IN the wind for nearly 15,000 clerical and allied employees of the University of California. American Federation of State, County and Municipal Employees, Local 3299, is making a bid to decertify the Coalition of University Employees, which now represents the unit of clerical workers, library assistants, childcare workers, and police dispatchers. The Communications Workers of America has jumped into the fray. As *CPER* went to press, CUE was holding an affiliation vote designed to fend off decertification and boost its strength.

Reversing History?

CUE has represented the clerical unit at U.C. since 1997, when it

defeated AFSCME in a decertification election. At the time, a founding CUE member, Janice Kimball, criticized AFSCME for its lack of communication and an inadequate representation effort. (See story in *CPER* No. 127, pp. 44-46.) CUE envisioned itself as a union run by members for members. Now CUE finds itself with declining membership and vacant leadership positions.

CUE's collective bargaining agreement expired in September 2008. The union has been bargaining for a successor contract since May 2008, and has been in mediation since January. Before mediation, the university was offering no raises for clerical employees. Meanwhile in February 2009,

decertification election. Touting cost-of-living increases, step increases, and job protections it recently won, Local 3299's new website warns that clerical employees need a strong union to fight U.C.'s proposals to raise employee pension contributions and cut back retiree health benefits.

Many Choices

After quickly interviewing several large unions, the CUE executive board voted to affiliate with the International Brotherhood of Teamsters. In a letter to union members, the leadership explained that affiliation with the Teamsters would allow CUE to remain autonomous and continue as a member-run union. A Teamsters affiliation would bring strength to

the bargaining table and help out in a strike, CUE chief negotiator Amatullah Alaji-Sabri told *CPER*. CUE also considered the fact that AFSCME has a no-raid agreement with the Teamsters. If the affiliation is successful, CUE reasons, AFSCME will have to drop its decertification effort.

CUE finds itself fighting on many fronts. As it began its campaign to convince its members to ratify the vote to affiliate with the Teamsters, it discovered some members had contacted the Communication Workers of America, parent of the University Professional and Technical Employees, a sister union representing U.C. researchers and technical workers. The pro-CWA clerical employees began their campaign by proposing CWA affiliation as an alternative to Teamster affiliation, but soon began collecting authorization cards on behalf of the New Alliance of Clerical Employees-CWA, so that it can be on the ballot if a decertification election occurs. Now CUE is trying to convince employees not to sign AFSCME or NACE-CWA cards, while attempting to forge a contract settlement with U.C.

CUE is warning unit members that a decertification petition would interfere with collective bargaining during the critical stage of mediation, and if CUE is decertified, employees could lose contractual protections until a new contract is reached. Unfair practice charges it has filed on U.C.'s decision to subject employees to temporary layoffs in place of furloughs would

also be jeopardized, CUE cautions, including the right to obtain back pay for lost earnings.

CUE points out that AFSCME and CWA dues are higher than Teamsters dues. There is also the question of whether CWA's attempts to represent the unit would violate Article 21 of the AFL-CIO's constitution, which discourages an affiliate's attempts to organize workers if another AFL-CIO affiliated union, like AFSCME, is already organizing those employees.

The affiliation ratification vote was initially scheduled to end in late April. However, that deadline has been extended twice because vote counts showed that the number of members casting ballots was less than the 50 percent minimum set by CUE's constitution for a valid affiliation vote. Members are now filing internal grievances about the election extensions. If at least 50 percent of the members cast ballots, two-thirds of them must vote for affiliation to ratify the executive board's affiliation decision. *

State Employment

DPA May Grant Supervisors Smaller Compensation Increases Than Rank-and-File Correctional Officers

THE CALIFORNIA Correctional Peace Officers Association went to a different court, but got the same answer. In deciding that the Department of Personnel Administration has discretion to grant supervisors salary increases in light of their overall compensation compared with rank-and-file officers, the First District Court of

CCPOA attempted to negotiate the same salary and benefit increases for correctional supervisors.

Appeal quoted heavily from its sister district's decision in *Wirth v. State of California* (2006) 142 Cal.App.4th 131, 180 CPER 53. In that case, the California Correctional Supervisors Organization, which represents some correctional supervisors, lost the argument that DPA should have granted to correctional supervisors the same 6.8 percent increase that CCPOA had negotiated for the correctional officers' bargaining unit.

Raise Not Equal

CCPOA represents some correctional supervisors, as well as the rank-and-file correctional officers' bargaining unit, in labor relations with the state, which is represented by DPA. Supervisor organizations have the right to meet and confer about compensation with the state, but cannot bargain to impasse.

In 2006, Arbitrator Alexander Cohn found that CCPOA's contract with the state required a 3.125 percent raise for rank-and-file correctional officers, retroactive to July 1, 2005. The arbitration award also ordered the state to increase the employer's contribution to health benefits. In meet and confer sessions in early 2007, CCPOA attempted to negotiate the same salary and benefit increases for correctional supervisors, but DPA declined to grant anything more than a 3.125 percent increase effective January 2007.

CCPOA argued that the Government Code required that supervisors automatically be given contemporaneous pay and benefit increases equivalent to those in the Cohn award. DPA insisted that the base pay increase, along with the overall differential between the supervisors' salary and

benefits and compensation of rank-and-file officers, satisfied its obligation under the Government Code. DPA showed that after implementing the Cohn award, supervisors still enjoyed an 11.45 percent differential in salary and benefits over bargaining unit members. Historical data showed that they had benefitted from a 5.94 percent advantage over the bargaining unit in the area of health benefits since 2004.

Supervisors still enjoyed an 11.45 percent differential in salary and benefits over bargaining unit members.

CCPOA filed a complaint in court attacking DPA's quasi-legislative action. The trial court concluded that Sec. 19849.18 of the Government Code did not require contemporaneous increases for supervisors every time rank-and-file officers received them. It found that DPA's statistical data showed that DPA had satisfied its statutory obligations, and it dismissed the case. CCPOA appealed.

Statutes Grant Discretion

In 1999, the legislature enacted a new law designed to prevent com-

paction of salaries because officers in some departments were earning more than their supervisors. Government Code Sec. 19849.18 requires that employees who supervise employees in bargaining units 5 (highway patrol officers), 6 (correctional officers), and 8 (firefighters) receive “salary and benefits changes that are at least generally equivalent to the salary and benefits granted to employees they supervise.” The term “salary” is defined to exclude overtime pay. The statute continues, “The benefit package shall be the economic equivalent, but the benefits need not be identical.”

The following year, the legislature passed a bill that declares, “A supervisory compensation differential is necessary to compensate state peace

officer/firefighter members who are supervisors” in the correctional agency and the state Department of Mental Health. The statute provides that “the value of salaries and other economic benefits shall be considered in calculating comparative rates.”

The court found in the statutory language no clear mandate that DPA automatically grant contemporaneous compensation increases every time employees in the bargaining unit received them. The inclusion of the phrase “generally equivalent to the salary and benefits of the employees they supervise” indicates the legislature intended that DPA consider “the totality of the circumstances, including the presence or absence of compaction, the size of the existing compensation

differential, and the condition of the state’s budget to fund increases,” the court explained.

Nevertheless, because the language is somewhat ambiguous, the appellate court reviewed the legislative history of the statutes. It relied heavily on the statutory interpretation by the *Wirth* court. The original bill would have required economically equivalent salary and benefit changes, but amendments inserted “at least generally” before “equivalent.” The bill’s supporters represented that it did not affect DPA’s salary-setting authority. Because the bill was watered down, the *Wirth* court concluded that Sec. 19849.18 was enacted to avoid salary compaction and enable recruitment and retention of supervisors, but not

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The cure for boredom is curiosity. There is no cure for curiosity.
-- Dorothy Parker, writer

This second edition includes recent developments relating to legislative approval of collective bargaining agreements; a discussion of recent Supreme Court cases that recognize civil service law limits; and a section on PERB procedures, including recent reversals in pre-arbitration deferral law.

This Guide provides a thorough description of the Dills Act — how it works, its history, and how it fits in with other labor relations laws. Also included are Public Employment Relations Board enforcement procedures, the text of the act, and a summary of all key cases that interpret the act, with complete citations and references to CPER analyses. In addition, there is a summary of PERB rules and regulations, a case index, and a glossary of terms designed for Dills Act users.

Pocket Guide to the Ralph C. Dills Act

By Fred D’Orazio, Kristin Rosi and Howard Schwartz • 2nd edition (2006) • \$12 <http://cper.berkeley.edu>

to provide exact or identical salary and benefits changes to supervisors and those they supervise. The legislature did not intend to strip DPA of all its discretion, the court emphasized.

The context of Sec. 19849.18 in relation to other laws supports this interpretation, the *Wirth* court found. When it delegated salary-setting authority to DPA in 1981, the legislature prohibited DPA from making

The court found it unlikely that the legislature intended to trigger automatic salary increases.

pay adjustments that would exceed the legislative appropriation for salaries. The court determined the legislature did not intend to surrender its control of expenditures. The court found it unlikely that the legislature, in enacting Sec. 19849.18, intended to trigger automatic salary increases without regard to appropriations. Rather than finding that the legislature repealed the appropriation requirement without expressly saying so, the court found it could harmonize the two statutes by “constru[ing] the term ‘salary and benefits changes’ as an entire package, affording DPA sufficient flexibility to maintain compensation differentials in times of penury as well as prosperity.” Noting that the state faces its greatest

budget crisis in decades, the *CCPOA* court rejected the union’s argument, which, the court said “would necessarily require DPA to navigate its fiscal authority directly onto the shoals of budgetary irresponsibility.”

The *CCPOA* court found the text and legislative history of Gov. Code Sec. 19849.22, enacted in 2002, rendered CCPOA’s position untenable. Since the legislature had substituted general language requiring a supervisory differential for the original language requiring a 10 percent differential between the rank-and-file and supervisors, the court found the legislature intended that DPA continue to have discretion over compensation increases. CCPOA’s interpretation ignored Sec. 19849.22, the court noted.

Having rejected a statutory interpretation that would have required automatic pay increases equal to the bargaining unit’s raises, the court measured DPA’s action against the statutory limits on its discretion. CCPOA, the court said, had presented no evidence that DPA had maintained an inadequate pay differential or ignored a serious compaction problem. In fact, DPA had found that supervisors received a higher medical contribution rate and an overall 11.45 percent differential in compensation. The court concluded that DPA acted reasonably and lawfully in granting only a 3.125 percent salary increase. (*California Correctional Peace Officers Assn. v. State of California* [2010] 181 Cal.App.4th 1454.) *

Statute Forbids Governor’s Furlough of State Compensation Insurance Fund Attorneys

The governor has no authority to furlough employees of the State Compensation Insurance Fund, the Court of Appeal ruled in *California Attorneys, Administrative Law Judges and Hearing Officers in State Employment v. Schwarzenegger*. The case is the first appellate decision addressing the legality of the governor’s executive order, which mandated two-day furloughs for all state employees beginning February 2009. The holding applies only to SCIF employees.

CASE Files Two Challenges

In December 2008, the governor issued an executive order directing the Department of Personnel Administration to adopt a plan to implement furloughs of most state employees for two days a month, “regardless of funding source.” In January 2009, CASE went to court in Sacramento for an injunction prohibiting furloughs of its members, who are attorneys, ALJs, and hearing officers. This first court case, which challenged the furlough

order on grounds applicable to state employees generally, was consolidated with similar cases filed by other unions. The Sacramento trial court ruled against CASE and the other unions, but clarified a few days later that the ruling applied only to executive branch employees, not employees of elected statewide officers.

In early February, CASE petitioned a San Francisco court for an injunction against furloughs for SCIF attorneys on the ground that the Insur-

The Insurance Code exempts SCIF from staff cutbacks otherwise required by law.

ance Code prohibits the governor from imposing staff cutbacks at the agency. SCIF is a constitutional agency governed by a board of directors, which has authority to administer the fund under the Insurance Code.

The trial court raised the question whether the second case should be stayed until resolution of the first case, but decided that the Sacramento court's ruling did not apply to SCIF, which is not an executive branch agency. The San Francisco court also found that the Insurance Code did not allow the governor to furlough the agency's employees. The governor and other state defendants appealed.

'Self-Operating' Agency

The governor argued that the doctrine of exclusive concurrent jurisdiction required that the San Francisco court's ruling be stayed until final resolution of the Sacramento case, which is on appeal. But the court agreed with the trial court. Since SCIF is not an executive branch agency, the court held, the Sacramento ruling did not apply to its employees. In addition, the union's legal contentions in that case did not include the Insurance Code argument that it presented to the San Francisco court. Therefore, the trial court did not err when it refused to stay CASE's second legal action.

The court agreed with CASE that the Insurance Code prohibits the governor from ordering a furlough of SCIF employees. It is subject to the Dills Act and to Government Code Secs. 19849 and 19851, which some trial courts have found authorized the furlough order. However, the Insurance Code exempts SCIF from "any hiring freezes and staff cutbacks otherwise required by law." This specific exemption overrides the more general provisions of the Government Code, the appellate court reasoned.

The governor argued that the Insurance Code bans layoffs but allows a reduction in hours. The court criticized the contention as "not sensible." "Staff is 'cut back' whether hours are reduced or employees are terminated," the court pointed out. And, an exemption from executive branch staff cutbacks is consistent

with the statutory scheme and the legislative history, the court reasoned. "As a 'quasi-governmental entity' mandated to be self-sufficient," SCIF, not the governor, has the authority to determine staffing needs, said the court. A report on the bill enacting the staff cutback exemption explained the purpose of the exemption was "to allow SCIF's executive leadership to exercise its best business judgment on SCIF's staffing needs" so that it could control insurance policy costs and provide better service to policyholders.

Staff is 'cut back' whether hours are reduced or employees are terminated, the court pointed out.

In addition, the court pointed out that furloughing SCIF employees could not meet the objective of the governor's order — to improve the ability of the state's general fund to meet its financial obligations. The insurance fund is a "self-operating" agency of the state and its moneys are not state funds. Any cost savings would only benefit the fund maintained exclusively for SCIF. The court affirmed the trial court judgment. (*California Attorneys, Administrative Law Judges and Hearing Officers in State Employment v. Schwarzenegger* [2010] 182 Cal.App.4th 1424.) *

Prison Education Program Loses 570 Teachers

THE BUDGET FOR the California Department of Corrections and Rehabilitation enacted last September estimated a savings of more than \$40 million from early release of inmates who completed vocational, educational, and other rehabilitation programs. But the same budget resulted in the layoff of hundreds of prison teachers in March. Corrections and Rehabilitation Secretary Matthew Cate asserts that cuts were made to ineffective programs, but the Bureau of State Audits reported in September that the prison system does not have the data or the information systems to track which educational programs are

most effective. SEIU Local 1000, which represents the teachers, has gone to court to overturn the program cuts and expedite the arbitration of hundreds of layoff grievances.

Corrections Layoffs

The budget passed in February 2009, and amended in July, cut \$1.2 billion from CDCR. In an attempt to reduce the prison population and save \$42 million, the legislature expanded opportunities for inmates to earn early release by completing educational and vocational programs, such as obtaining a General Educational Development

certificate. The same budget, however, cut \$200 million from inmate rehabilitation programs.

In late September, the department eliminated vacant positions and issued surplus notices to about 700 teachers in vocational and educational programs. Under state layoff procedures, those whose jobs were threatened had at least four months to look for other positions in state employment. Due to a mailing error though, many did not receive the final layoff notice as scheduled in January and were allowed to work until March 1. Although 570 teachers were eliminated from bargaining unit 3, represented by SEIU Local 1000, only about 200 actually were forced to leave state employment. Some teachers were moved into the librarian unit, and

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It's not enough that we do our best; sometimes we have to do what's required.

-- Sir Winston Churchill, statesman

The right to procedural due process is one of the most significant constitutional guarantees provided to citizens in general and to public employees in particular. Its entitlement has been created by statute, charter, ordinance, and other local laws or enactments. This pocket guide provides an overview of due process in public sector employment to assist employees and their employers in understanding their respective rights and obligations.

The guide— required reading — explains who is protected, what actions are covered, what process is due, remedies for violations, and more. A section focuses on the due process rights afforded to several specific types of employees: state civil service, public officers, police officers, school district employees, and community college district employees. The Pocket Guide also includes a discussion of *Skelly* and other key cases on due process and the liberty interest.

Pocket Guide to Due Process in Public Employment

By Emi Uyehara • 1st edition (2005) • \$12

<http://cper.berkeley.edu>

many vocational instructors took technical positions in a unit represented by the International Union of Operating Engineers.

The cuts are likely to reverse the expansion of educational programs that has occurred since 2007, when A.B. 900 mandated an increased emphasis on rehabilitation and educational programs in an effort to reduce recidivism. There still were only about 25,000 slots available for 170,000 inmates in 2009, but participation in

Five-hundred-and-seventy teachers were eliminated from bargaining unit 3.

the available academic programs had increased as new methods of targeting prisoners likely to reoffend were implemented.

Forced by the budget crisis to set aside two years of work designing a new educational system, Secretary Cate announced in September that CDCR was developing a streamlined rehabilitation model which would concentrate resources on programs that were most effective in reducing recidivism. While continuing to use assessment tools to determine which inmates to target, he planned to employ teaching assistants and trained inmates as literacy tutors to mitigate reduced class offerings.

That same month, the Bureau of State Audits reported that the department did not have the data on individual prisoners to assess how well specific programs worked to reduce the revolving door of paroled inmates returning to prison for new offenses. It also did not have the data to track inmate educational needs, a hindrance to developing a plan to match teachers to prisoner needs. The BSA asserted the lack of data made the department unable to track whether it complies with a state requirement that it provide literacy classes to at least 60 percent of inmates who are eligible for them.

Elimination of nearly half the prison teaching positions has cut the opportunities available to inmates. For example, instead of the 10,000 vocational education slots that were available in April 2009, there are only 4,800. The remaining classes are those that teach the most marketable skills and that can be completed in 12 months. In an attempt to continue to serve as many inmates as possible, some students may spend less time in academic classes. Those judged to have higher reading skills may be assigned to only three hours of class a week, while those with lower skills will be allowed more class time.

Cindy Fonseca, former bargaining unit chair and temporary staff member for SEIU Local 1000, was laid off in March after 16 years as a corrections educator. She told *CPER* that teachers were willing to take a paycut and reduce the school year to minimize

layoffs, but that option was rejected because it would limit the inmates' time in class. The union is skeptical of the plan to use 300 teaching assistants for study halls rather than having inmates in classes with certificated teachers.

New Lawsuits

In an effort to restore the rehabilitation programs, SEIU Local 1000 filed for an injunction against the program cuts last December. The union contends that the reduced op-

Cate planned to employ teaching assistants and trained inmates as literacy tutors.

portunities do not comply with the minimum inmate rehabilitation services required by A.B. 900 and other state laws. The judge refused to issue an injunction but did allow the union to amend its complaint in March. This month, the court will hear the state's motion to dismiss on the grounds that the union has no standing to challenge the reductions.

Hundreds of grievances relating to the layoffs also have been filed and are waiting for Department of Personnel Administration action. Employees are claiming that their seniority rights have been violated because layoffs were based on seniority within their county,

even though they worked at a regional institution. Others are claiming that their positions were given the wrong classification codes, which then affected their seniority rights.

*Local 1000 has
applied for a
court order
speeding up the
arbitration process.*

Local 1000 has applied for a court order speeding up the arbitration process. A section of the California Arbitration Act allows a court to step in if a party shows that any arbitration award they receive may be rendered ineffectual without provisional relief. The union asserts that employees will be irreparably harmed if the arbitration process drags out. Employees have been forced into jobs that pay half of their former salary, if they have not lost their employment altogether. In combination with a year of furloughs reducing pay by nearly 15 percent, they are unable to meet financial obligations. "People are losing their homes and other possessions. An arbitrator needs to be able to decide the issues before further irreparable harm occurs," says Local 1000 attorney Anne Giese. *

Discrimination

Labor Code Sec. 233 Does Not Apply to Uncapped Sick Leave Policies

THE CALIFORNIA Supreme Court, in *McCarther v. Pacific Telesis Group*, has determined that Labor Code Sec. 233, which permits employees to use accrued paid sick leave to care for ill relatives, does not apply to sick leave policies that provide for an uncapped number of paid sick days off.

Employees Kimberly McCarther and Juan Huerta belong to the Communication Workers of America. Section 5.01F of the collective bargaining agreement between the company and the union provides that employees be compensated for any day in which they miss work due to their own injury or illness for up to five consecutive leaves of absence. Once the employee returns to work following any period of absence, Sec. 5.01F is again triggered if the employee is injured or sick. Employees do not accrue paid sick leave and there is no cap on the number of days employees may be absent under Sec. 5.01F. There is no provision in the CBA for paid leave to take care of sick relatives.

The contractual attendance policy provides for progressive discipline. Under its terms, an employee is not meeting attendance standards if he or she has eight or more absences in a 12-month period or more than four

full days of absence and three or more multi-day absences in a 12-month period, with no extenuating circumstances.

Under Labor Code Sec. 233, commonly known as the “kin care” statute, “any employer who provides sick leave for employees shall permit an employee to use in any calendar year the employee’s accrued and available sick leave entitlement, in an amount not less than the sick leave that would be accrued during six months at the employee’s then-current rate of entitlement, to attend to an illness of a child, parent, spouse, or domestic partner of the employee.”

McCarther and Huerta each took time off to care for a sick relative for which they were not paid. They filed a lawsuit claiming that the company should have paid them under Sec. 233. The trial court concluded that the sickness absence policy in the contract did not constitute sick leave within the meaning of Sec. 233 and dismissed the case. McCarther and Huerta appealed. The Court of Appeal reversed, finding that the CBA’s policy amounted to a conveyance of sick leave for Sec. 233 purposes.

The Supreme Court disagreed, concluding that the legislature intend-

ed Sec. 233 to apply only to employers that provide a measurable, banked amount of sick leave. It reasoned that Sec. 233’s requirement that employers permit employees to use at least the amount that would be accrued during six months cannot “sensibly” be applied to Pacific Telesis’ policy “because it is impossible to determine the amount of compensated time off for illness to which an employee might be entitled in a six-month period.”

Sec. 233 applies only to employers that provide a measurable, banked amount of sick leave.

The court found further support for its interpretation of the legislature’s intent in Labor Code Sec. 234, which prohibits employers from using an absence control policy to “count sick leave taken pursuant to Section 233 as an absence that may lead to or result in discipline, discharge, demotion, or suspension....” In this case, the court noted, the only limitation on the amount of time off an employee can claim under the employer’s sick leave policy is its attendance management policy that includes a schedule of progressive discipline if he or she is absent eight days or more a year. If Sec. 233 were applied to the company’s sick

leave policy, Sec. 234 would prohibit it from using its attendance management policy to limit the amount of kin care an employee could claim, instructed the court. “Thus, rather than being entitled to use for kin care half of the amount of compensated time the employee could use as sick time, sections 233 and 234 together would permit an employee to claim as kin in care far more compensated time off than the employee would be entitled to claim if personally ill,” the court said. “Such a result would be contrary to the plain intent of section 233, which requires only those employers who provide sick leave in accrued increments to permit employees to use half of that annually accrued amount for kin care.”

The court rejected the Court of Appeal’s reasoning that an employee’s kin care entitlement could be based on the amount of sick leave the employee actually uses in one year. It said that “an interpretation of the statute that renders impossible an accurate calculation of an employer’s kin care entitlement” is “illogical” and contrary to the legislature’s “clear intent” “to provide employers with guidelines to ascertain, with precision, an employee’s kin care leave entitlement.”

The court also was not persuaded by the plaintiffs’ argument that the term “accrued” as used in the section did not have a temporal element. “‘Accrued’ means ‘accumulated’ each time it appears in the statute,” said the court, and the company’s policy “is not an accumulation policy.” (*McCarther v. Pacific Telesis* [2010] 48 Cal.4th 104.) *

FMLA Front Pay Is an Equitable Remedy to Be Decided by the Court

THE NINTH Circuit Court of Appeals, in a case of first impression, has ruled that front pay under the federal Family Medical Leave Act is an equitable remedy to be determined by the judge, not the jury.

Jill Traxler began working for Multnomah County in 1987. She took medical leave under the FMLA for a serious physical health condition in 2002 and again in 2005. She never exceeded the maximum amount of leave allowed by the act — 12 workweeks in a 12-month period. In 2005, Traxler’s position was eliminated. She was placed on administrative leave and then demoted. She continued to take FMLA leave. She received an unfavorable performance review in her new position and, in September 2005, she was terminated.

Traxler filed a lawsuit claiming that the county had taken adverse employment actions against her because of her use of FMLA leave. The jury found in her favor and awarded her \$250,000 in back pay and \$1,551,000 in front pay. The district court judge declined Traxler’s request for liquidated, or double, damages. The district court then granted the county’s post-trial motion requesting judgment as a matter of law on the grounds that it had erred in allowing the jury to calculate the amount of front pay. It vacated the jury’s front pay award and

awarded Traxler \$267,000 in front pay. Traxler appealed.

The appellate court, in coming to its determination, noted that the FMLA does not explicitly grant plaintiffs the right to front pay. The act’s provision governing an employee’s remedies against an employer are divided into two subsections. The first allows “damages” for past costs, including “wages, salary, employment benefits, or other compensation denied or lost.” It also covers non-wage

The FMLA does not explicitly grant plaintiffs the right to front pay.

actual monetary losses, interest, and liquidated damages. Because front pay is not included in the enumerated damages in the first subsection, it must fall within the second, which allows for “such equitable relief as may be appropriate, including employment, reinstatement, and promotion.” “Thus,” said the Ninth Circuit, “the court’s power under the FMLA to award front pay, as an alternative to reinstatement, is derived solely from the statutory provision permitting the

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Facts do not cease to exist because they are ignored.

-- Aldous Huxley, writer

Get a comprehensive look at the unfair practices created by state laws covering public school, state, higher education, and local government employees. The 4th edition details important developments in California's public sector labor law, including the Board's arbitration deferral standards, restoration of the doctrine of equitable tolling, and the addition of three statutes to PERB's jurisdiction: Trial Court Employment Protection and Governance Act, Trial Court Interpreter Employment and Labor Relations Act, and the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act.

Along with extensive statutory and regulatory text, the guide includes the unfair practice sections of EERA, the Dills Act, HEERA, the MMBA, TCEPGA, TCIELRA, and TEERA. A guide to cases further elaborates what conduct is unlawful, and a glossary defines labor relations terms.

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court to award "such equitable relief as may be appropriate."

The appellate court instructed that "the characterization of front pay as an equitable remedy is consistent with the general nature of front pay in the context of other employment related statutes." It cited the Title VII case of *Pollard v. El du Pont de Nemours & Co.* (2001) 532 U.S. 843, in which the Supreme Court distinguished front pay from compensatory damages stating, "in cases in which reinstatement is not viable...courts have ordered front pay as a substitute for reinstatement."

"As a practical matter," said the court, "front pay is awarded at the court's discretion only if the court determines that reinstatement is inappropriate, such as where no position

is available or the employer-employee relationship has been so damaged by animosity that reinstatement is impracticable." And, the court recognized, "it makes little sense to say that the availability of front pay is a judicial determination and the amount [is] a jury determination." The decision as to whether reinstatement is feasible is "a balance of equitable concerns." "Deciding what amount would compensate for the inability to get a job back is not a form of linear fact-finding appropriately left to the jury," the court continued. "Just as reinstatement invokes equitable factors, so does front pay as a proxy. Judicial discretion is at the heart of the decision."

The court's view is consistent with the Fourth, Fifth, and Tenth Circuits.

Only the Sixth Circuit has decided differently, holding that the district court determines the propriety of awarding front pay, but the jury decides the actual amount.

Traxler based her argument that the amount of front pay should be determined by the jury on the Ninth Circuit's decision in *Cassino v. Reichhold Chemicals, Inc.* (9th Cir. 1987) 817 F.2d 1338, a case brought under the Age Discrimination in Employment Act. In that case, the court stated that "if the court concludes that reinstatement is not feasible, the jury then decides the amount of the front pay award." The court here rejected Traxler's reliance on *Cassino* because the quoted statement she referenced was "plainly dicta," and because the statement,

even if not dicta, was not inconsistent with its view in this case since “a trial court, sitting in equity, may nevertheless employ an advisory jury,” but the ultimate decision rests with the court. It also distinguished *Cassino* because it was decided under the ADEA, not the FMLA.

The court ruled that the district court did not err in its calculation of the amount of front pay. However, it found that the denial of liquidated damages was not supported by specific findings and sent the case back to the district court for an explanation. (*Traxler v. Multnomah County* [9th Cir. 2010] 596 F.3d 1007.) *

California Fair Employment and Housing Commission Proposes Amending Pregnancy Regulations

THE STATE’S Fair Employment and Housing Commission has announced that it proposes to amend existing sections 7291.2-7291.6 of its regulations entitled “Sex Discrimination: Pregnancy, Childbirth or Related Medical Conditions.”

In its statement of reasons, the commission explains that it seeks to amend the regulations “to provide clarity for employers seeking to comply with the Fair Employment and Housing Act’s provisions covering pregnancy, childbirth or related medical conditions, including recent amendments to FEHA in 1999.” Many of the proposed changes address the requirement that employers provide reasonable accommodation for a pregnant employee, added by the 1999 amendments to the act. Another proposed change clarifies the term “related medical condition” to include conditions such as stillbirth and postpartum depression.

The proposed changes can be found at http://www.fehc.ca.gov/act/pdf/pregnancyregulations/TEXT_OF_PREGNANCY_REGS.doc. The commission will hold two public hearings, one in Los Angeles on June 1, and one in San Francisco on June 2. Written comments can be submitted until 5 p.m. on June 2, 2010. *

Public Sector Arbitration

Court May Vacate Award Where Arbitral Error Forecloses Hearing on the Merits of FEHA Claim

THE CALIFORNIA Supreme Court wedged open the courthouse door to allow narrow review of arbitrator error in cases involving unwaivable statutory rights such as the Fair Employment and Housing Act. In *Pearson Dental Supplies v. Superior Court*, the plaintiff's age discrimination claim was completely barred when an arbitrator misinterpreted a law tolling the agreement's one-year period for initiating arbitration. The ruling widens slightly the scope of judicial review when parties move to vacate an award on the ground that the arbitrator exceeded his powers. As written, it is applicable only to cases involving unwaivable statutory rights, not generally to collective bargaining arbitrations.

Filed in Court

Luis Turcios was a janitor for Pearson Dental Supplies. He was terminated on January 31, 2006, at the age of 67. After he filed an administrative complaint and received a right-to-sue letter from the Department of Fair Employment and Housing, he sued his former employer for age discrimination and other claims on October 2, 2006. Although the company tried to obtain dismissal of the claim for various reasons, it did

not raise the arbitration agreement in the motion to dismiss or in the answer that it later filed.

In March 2007, the employer filed a motion to compel arbitration based on a dispute resolution agreement Turcios signed after he was hired. The agreement required that Turcios initiate arbitration within one year of becoming aware of facts giving rise to the dispute. The trial court sided with the employer, orally at the April hearing and in a written order on May 2. Turcios asked the Court of Appeal to review the trial court's decision, but the appellate court denied the petition on May 31, 2007.

On June 13, 2007, Turcios and the employer agreed on an arbitrator. A month later, the employer moved to dismiss the claim on the ground that Turcios did not initiate arbitration proceedings until more than a year after he was fired. Turcios responded that the one-year statute of limitations in the arbitration agreement was unconscionable because it was shorter than the time allowed by the FEHA. He also argued that Code of Civil Procedure Sec. 1281.12 tolled the agreement's one-year contractual limitations period while he litigated his age discrimination claim in court.

The arbitrator ruled against Turcios without explanation. Because he decided Turcios had waived his right to pursue his claims, Turcios had no recourse for his discrimination claim. Pearson Dental Supplies petitioned the trial court to confirm the award, while Turcios moved to vacate it. The trial court found the arbitrator had misinterpreted the tolling provisions of Sec. 1281.12. The judge invoked *Armenendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 144 CPER 69, and vacated the award.

The arbitrator had misinterpreted the tolling provisions of Sec. 1281.12.

On appeal, the appellate court agreed that the arbitrator had erred, but it adhered to the scope of judicial review announced in *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1. Because the *Moncharsh* rule does not allow a court to vacate an award even when the arbitrator made errors of law, the Court of Appeal reversed the lower court. Turcios asked the Supreme Court to review two issues — the proper scope of judicial review and whether the arbitration agreement was unconscionable because it restricted his administrative remedies.

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A positive attitude may not solve all your problems, but it will annoy enough people to make it worth the effort.

-- Herm Albright, writer

Every step in the arbitration process — from filing a grievance to judicial review of arbitration awards — is clearly explained. Specifically tailored to the public sector, the guide covers the hearing procedure, rules of evidence, closing arguments, and remedies. The Guide covers grievance arbitration, as well as factfinding and interest arbitration. Included are a table of cases, bibliography, and index.

This Guide is designed for day-to-day use by anyone involved in a grievance arbitration, interest arbitration, or factfinding case.

Pocket Guide to Public Sector Arbitration: California

By Bonnie Bogue and Frank Silver • 3rd edition (2004) • \$12

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Moncharsh Loosened

The Supreme Court agreed that the arbitrator had misread a law that tolls deadlines in an arbitration agreement while the dispute is pending in court. The statute provides that if an agreement requires that a party demand arbitration within a period of time, filing a lawsuit on the controversy within that period tolls the time limitations in the agreement until 30 days after the court's final determination. Analogizing the concept of "tolling" to the hands of a clock, the court reiterated previous court rulings, which hold that time stops running while it is tolled, but starts again at the place where the clock stopped when the reason for tolling no longer applies.

Since Turcios had filed his lawsuit after approximately eight months, the one-year period had not expired.

After the court ruled he was required to arbitrate the case, he still had nearly four months to initiate arbitration. Whether the date of the court's final determination was the April hearing date or the point when the appellate court denied review of the judge's decision, the arbitration demand was timely.

The court rejected the employer's argument that the one-year period expired 30 days after the first judge ordered the case to arbitration. The only way that result would occur, the court said, would be if the time clock kept running while the lawsuit was pending, but the expiration of the one-year deadline was merely abated until 30 days after the arbitration order. Not only is this interpretation of the law different than the usual meaning of tolling, said the court, but it is at odds with the language of the statute, which

says that tolling begins "from the date the civil action is commenced."

Under *Moncharsh*, however, a court can vacate an award only for reasons listed in the Code of Civil Procedure, which does not list arbitral error as grounds for overturning an award. The *Moncharsh* court stated, "It is well settled that arbitrators do not exceed their powers merely because they assign an erroneous reason for their decision," although the court did leave open the possibility that an exception might be made in limited circumstances when an award is "inconsistent with the protection of a party's statutory rights."

In *Armendariz*, the Supreme Court held that mandatory employment arbitration agreements must allow a party to fully vindicate statutory rights in the arbitral forum. One of the factors the *Armendariz* court scrutinized was

whether the agreement called for a written decision and sufficient judicial review “to ensure the arbitrators comply with the requirements of the statute.” Although it announced no further guidelines in *Armendariz*, the Supreme Court addressed the sufficiency of judicial review in the *Pearson Dental Supplies* case.

The court limited this expansion of judicial review to cases where the error precluded a hearing.

The arbitrator’s error did not just bar Turcios’ claim, the court said, it misconstrued the procedural framework of the California Arbitration Act, under which the parties agreed the arbitration was to be conducted. It is difficult to imagine a better example of when finality of an arbitrator’s award would be inconsistent with protection of statutory rights than the present case, the court declared. “As a result of allowing the procedural error to stand, and through no fault of the employee or his attorney, the employee [would] be unable to receive a hearing on the merits of his FEHA claims *in any forum*.”

The court emphasized that it was limiting this expansion of judicial review to cases where the arbitrator’s

error precluded the employee from a hearing on FEHA claims or claims involving other unwaivable statutory rights. When an arbitrator’s error has barred a hearing on the merits of such a claim, the arbitrator has exceeded his or her powers and a court may vacate the award.

The court also addressed whether the arbitration agreement was unenforceable because it purported to waive the employee’s right to administrative remedies. This provision, combined with the shorter one-year statute of limitations, makes the agreement unconscionable, Turcios argued. The court rejected his contention because he had not raised it in the lower courts.

In addition, the Supreme Court found the disputed provision could be construed in a lawful way. Although state and federal law do not allow an arbitration agreement to waive the right to go to the DFEH or the Equal Employment Opportunity Commission, federal case law does allow an arbitration agreement to waive the right to take claims to an agency that adjudicates them, such as the Labor Commissioner. Because the language of the agreement could be read as lawful, it was not unconscionable. (*Pearson Dental Supplies, Inc. v. Superior Court* [4-26-10] Supreme Ct. S167168, __ Cal.4th __, 2010 DJDAR __.) *

Arbitrator’s Reinstatement of Laid-Off Grievant Did Not Exceed Her Powers

WHERE THE agreement provided both express bumping rights and good faith meeting and conferring over the union’s proposed alternatives to lay-off, the arbitrator did not exceed her powers when she reinstated a laid-off employee to a position not required by the bumping provisions, the Court of Appeal ruled. Since nothing in the agreement precluded the arbitrator from reinstating the grievant to the position, and the remedy was rationally related to the arbitrator’s interpretation of the contract, the Court of Appeal found the remedy did not modify the agreement.

Nowhere to Bump

Donise Manchester had been employed by the San Francisco Housing Authority for 16 years when she was laid off for budgetary reasons in September 2005. During her tenure, while working in an administrative clerk position, she requested an audit of the job. It was eventually reclassified as a senior administrative clerk position. However, she had left the job by the time it was reclassified.

In 2003, Manchester was reassigned to a distribution specialist position at the warehouse to avoid layoff. Although she believed the position

was a laborer's position beneath her skill level, she continued to receive the higher pay of her prior job.

In 2005, the Housing Authority laid off 29 employees, including 5 temporary workers. Seven permanent employees were slated for layoff, although one had bumping rights into a senior administrative clerk position.

Manchester was laid off because she was the least-senior distribution specialist, and the memorandum of understanding with the union required layoff by seniority within the classification. Although the contract allowed bumping into lower classifications in some circumstances, there were no lower-level classifications into which she could bump.

Lack of Good Faith

The MOU between the Housing Authority and Manchester's union, SEIU Local 790, included a provision that allowed the union to request to meet and confer over alternatives to proposed layoffs. During that process, SEIU proposed that Manchester be allowed to bump into the senior administrative clerk position. At the time, there were several temporary senior administrative clerks. The union also proposed that Manchester be permitted to bump into a clerk position for which she was on an eligibility list. The Housing Authority refused both proposals because Manchester had never held either position and therefore had no bumping rights under the MOU.

Manchester filed a grievance claiming several violations of the MOU, including violation of the layoff provisions and reprisal for union activity, but only the arbitrator's findings and remedy related to the layoff provisions were at issue on appeal. The arbitrator found that the Housing Authority had not violated the MOU's seniority bumping rights language but

The contract language expressed the obligation that the Authority consider the layoff alternatives in good faith.

had violated the provision requiring it to meet and confer in good faith with the union concerning layoff alternatives.

At the arbitration, a union representative testified that the employer had rejected the union's proposals to waive the MOU in order to avoid Manchester's layoff. The human resources director testified that the authority did not allow Manchester to bump into the clerk positions because she had never held those jobs, and because it wanted to avoid a grievance by a bumped clerk. The director admitted that there were temporary clerks in senior administrative clerk positions. She

also acknowledged that nothing in the MOU prohibited placing employees in positions into which the contract did provide automatic bumping rights.

The arbitrator reasoned that the contract language requiring the parties to meet and confer on alternatives to layoff expressed the obligation that the Housing Authority consider the alternatives in good faith. The authority's rejection of the union's proposals on the grounds that they were not required by the bumping provision "rendered meaningless the contract provision that requires the parties to meet and confer over 'alternatives' to layoff," she observed. The purpose of the meet and confer provision, said the arbitrator, is to recognize that circumstances may justify an alternative not expressly required by the layoff article.

The arbitrator pointed out that any agreement the union and employer reached would amend the MOU, precluding a grievance by a bumped employee. Even without a contract modification, the temporary employees in the senior administrative clerk positions would have no layoff rights to grieve because they accrue no seniority. Since nothing indicated that Manchester was not qualified for the senior administrative clerk position, and Manchester had worked in an administrative clerk provision that was audited during her tenure but reclassified after she left, the strict application of the contract thwarted the purpose of the layoff provision. The

arbitrator concluded that the Housing Authority's decision to reject the proposal was arbitrary and without a rational basis.

The arbitrator directed the Housing Authority to reinstate Manchester and place her in a senior administrative clerk position that was filled by a temporary clerk at the time of the layoff. She also ordered that Manchester be made whole in compensation and seniority to the date of reinstatement.

The Housing Authority moved to vacate or correct the award on the grounds that the arbitrator exceeded her powers by ordering reinstatement of Manchester to a position she was not entitled to under the MOU. The trial court vacated the award because it found the arbitrator's remedy was contrary to the layoff provisions of the MOU. It ordered the parties to meet and confer in good faith on alternatives to Manchester's layoff. SEIU appealed.

Reinstatement Not Prohibited

The appellate court explained that arbitrators do not ordinarily exceed their power by reaching erroneous conclusions of law or fact. Unless the contract or the parties' issue submission imposes specific limits on the arbitrator, a court should review only whether the remedy bears a rational relationship to the contract as the arbitrator interprets it and to the contractual violation found. The question, said the court, is whether the arbitrator's remedy was even arguably based on the contract or whether it

conflicts with the express terms of the agreement.

The MOU expressly prohibits the arbitrator from modifying or amending the contract. The Housing Authority argued that the arbitrator expressly acknowledged she was modifying the contract. The court did not agree. Instead, the court pointed out, the arbitrator recognized only that the parties could modify the contract during meet and confer sessions and prevent a grievance by a bumped employee. The arbitrator did characterize the union's proposal as a waiver of "strict application of the contract's requirements," but she emphasized that the union's senior administrative clerk alternative would not have violated other employees' contractual rights "even without any modification" of the MOU. "As interpreted by the arbitrator, the meet-and-confer provision of the MOU *required* the parties to consider alternatives to layoff 'not expressly addressed in the layoff article,'" the court emphasized.

The opinion contains a review of several California and federal cases. The court distinguished those cases where courts had found that the remedies conflicted with clear language in the contract. In others, courts had upheld arbitrators' remedies that were not expressly forbidden by the contract or the issue submission. The mere existence of a "no modification" clause in those cases "did not prevent the arbitrator from fashioning a remedy that was neither expressly contemplated nor directly contrary to the agreement," the court explained. It found that the arbitrator's remedy did not conflict with clear language of the contract and was rationally related to her interpretation of the MOU and to the contract violation she found. The court held the arbitrator had not exceeded her powers by amending the contract, and ordered the trial court to confirm the arbitrator's award. (*San Francisco Housing Authority v. SEIU Loc. 790* [2010] 182 Cal.App.4th 933.) *

Arbitrator Imposes 'Last Chance Agreement'

AN EMPLOYEE's failure to measure up to the employer's productivity rule is cause for discipline, an arbitrator held, but termination was too severe a penalty, given the grievant's length of service. The grievant had spearheaded an effort in opposition to the rule in her capacity as the chief union steward. But, Arbitrator William

Riker concluded that discipline was appropriate because she had received repeated notices that she was failing to meet expectations, including a three-day suspension, and, in the past, had demonstrated the ability to comply with the rule.

The grievant worked as a call-referral operator under contract with

the County of Los Angeles. She and other community resource advisors handled calls from the public and directed individuals to government and public service agencies who offer such services as suicide prevention and homeless assistance. In 2008, the county gave notice that it expected the community resource advisors to perform their core job assignment a minimum of 70 percent of their 8.5 hour workday.

Management had the discretion to establish a reasonable productivity standard.

Riker first found that management had the discretion to establish a reasonable productivity standard based on the needs of its enterprise. The grievant and others felt that the 70 percent rule was too high. To demonstrate her opposition to the rule, the grievant maintained one of the lowest productivity rates of all her coworkers, for which she received a written warning.

After the grievant was made aware of her deficiencies, management made numerous efforts to encourage her to meet the 70 percent standard. For some periods she met the standard but then dropped below the mark. After receiving additional warnings, including a three-day suspension, the

grievant's level of performance fell below the productivity standard, and she was notified of her termination. On this record, Riker said, the employer presented sufficient evidence of the grievant's inattention to the 70 percent rule and, on some occasions, outright defiance of it.

Lastly, Riker considered factors that might mitigate the severity of the punishment. He noted that the grievant had worked for the agency for 20 years, and the month prior to her termination had attained a 69 percent production standard. Riker also noted that other employees who failed to meet the standard were not treated as harshly. "In fairness and consistent with the principles of progressive discipline," Riker wrote, the grievant "should not be thrown out with the bathwater." Mindful of her prior three-day suspension and recognizing his authority to fashion a remedy "that justly fits the particular circumstances," the arbitrator directed that the grievant be offered a "last chance agreement" stipulating that she maintain the required 70 percent productivity standard. This discipline, he said, will make it clear to the grievant that "while one can take the time to protest...it is now time to follow the rules...." Riker reduced the termination to a three-month suspension and noted that failure to meet the productivity standard would result in termination. (*Information & Referral Federation of Los Angeles County and SEIU, United Healthcare Workers West* [2-24-10] 17 pp. Representatives: David S. Allen

[Jackson Lewis] for the employer; James Rutkowski [Weinberg, Roger & Rosenfeld] for the union]. Arbitrator: William Riker, CSMCS Case No. ARB-08-0322.) *

Arbitration Log

- **Discipline — Excessive Force**
- **Progressive Discipline**

City of Oroville Police Dept. and Oroville Police Officers Assn. (5-8-09; 24 pp.). *Representatives:* Michael J. DePaul (Liebert Cassidy Whitmore) for the city; Steven W. Welty (Mastagni, Holstedt, Amick, Miller, Johnsen & Uhrhammer) for the union. *Arbitrator:* Jerilou H. Cossack, CSMCS Case No. ARB-07-0634.

Issue: Did the city have just cause to terminate the grievant?

City's position: (1) The grievant used excessive force when arresting a juvenile for truancy, intentionally submitted a factually inaccurate police report, provided false testimony to internal affairs, and fabricated testimony during the arbitration.

(2) The surveillance video establishes that the juvenile did not display aggressive conduct. He was compliant and passive. There is no evidence of resistance, a flight risk, or a safety threat.

(3) There are inconsistencies among the grievant's police report, the internal affairs investigation, the arbitration hearing, and the video.

(4) The grievant's employment record shows a propensity to exercise poor judgment and engage in serious misconduct, such as disrespectful language, excessive force, dishonesty, and failure to meet performance standards.

Union's position: (1) The grievant's use of force was reasonable. The juvenile

was six-feet tall and weighed 190 pounds. He attempted to flee the police and was under the influence of marijuana. He was uncooperative, hostile, and displayed gang colors.

(2) Escalation of force was consistent with the grievant's training and police officer standards. The juvenile ignored orders to sit down. When the juvenile showed physical resistance, the grievant escalated his force by pushing the juvenile off balance and using his knee to cause the juvenile to bend over into the chair.

(3) There is no evidence that the grievant was dishonest. All of his statements about the incident are consistent.

(4) Termination does not conform to principles of progressive discipline. The grievant has no past discipline for excessive force. He has good law enforcement skills and has received positive evaluations and commendations.

Arbitrator's holding: Grievance denied.

Arbitrator's reasoning: (1) During his interaction with the grievant, the juvenile's hands were cuffed behind his back, and he showed no inclination toward physically aggressive behavior. The grievant had other options than forcing the juvenile into the seat.

(2) The juvenile was not under arrest. He was in custody for truancy. The grievant was in little danger, and there was little likelihood that the juvenile would attempt to escape.

(3) At all times, the grievant had complete physical control of the juvenile. Under these circumstances, the grievant's use of his knee was not appropriate.

(4) The video contradicts the grievant's testimony in several significant respects. His testimony during the internal affairs investigation and the arbitration hearing differs from the acts described in the police report. The report portrays an encounter completely at variance with what is on the video. It grossly misrepresents what happened. His testimony goes beyond exaggeration; it is outright falsehood.

(5) Prior instances of misconduct demonstrate a failure to be truthful and accurately portray facts and events. In this matter, the grievant grossly mischar-

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acterized the events and the tenor of the interaction. Just cause for discharge is demonstrated.

(Binding Grievance Arbitration)

- **Resignation**
- **Light-Duty Assignment**

ABC Unified School Dist. and AFSCME Loc. 2229 (10-8-09; 27 pp.). *Representatives:* Sharon J. Ormond (Atkinson, Andelson, Loya, Ruud & Romo) for the district; Pete Schnaufer (business agent) for the union. *Arbitrator:* Walter Kaufman, AAA 72 390 00977 08.

Arbitrability: The grievance is not barred by the Workers' Compensation Act because the benefits sought by the union derive from the contract. The grievant has standing to contest the validity of his resignation.

Issue: Did the district violate the parties' agreement by declining to reinstate the grievant and forcing his resignation?

Union's position: (1) The district unreasonably denied the grievant a light-duty assignment following his injuries.

(2) The district misled the union into believing that the grievant was not entitled to temporary total disability prior to his resignation.

(3) The grievant was forced to resign before he received his temporary total disability benefits. Had the grievant received this benefit on time, he would have remained an employee and, under the terms of the parties' contract, would not have exhausted his vacation and sick leave.

District's position: (1) The grievant was placed on a light-duty assignment while his ability to perform his work was

evaluated. Following an interactive process, it was determined that the grievant could not return to duty.

(2) The denial of temporary total disability was not attributable to the district, but to the grievant's treating physician who misstated the date of injury in his report.

(3) The grievant had several months to decide whether to retire and was not coerced into doing so.

Arbitrator's holding: Grievance denied.

Arbitrator's reasoning: (1) The arbitrator cannot second-guess the outcome of the interactive process and conclude that the district unreasonably denied the grievant a light-duty assignment.

(2) The union does not specify the nature of the alleged misleading information concerning the grievant's entitlement to temporary total disability. The workers' compensation benefit was denied based on erroneous information provided to the company that administers the district's workers' compensation claims.

(3) The grievant's decision to retire was voluntary. The evidence does not support the conclusion that the district deliberately withheld retroactive application of the total disability benefit. The grievant did not seek to revoke his resignation until the benefit was awarded, more than a month after he retired.

(4) The district did not disregard the recognition clause of the parties' agreement designating the union as the exclusive representative of the bargaining unit employees when the director of human resources failed to call the union

president to ensure the grievant was aware of his options.

(Binding Grievance Arbitration)

- **Union Conference Leave**

United Professors of Marin, CFT/AFT, and Marin Community College Dist. (12-7-09; 28 pp.). *Representatives:* David Conway (Law Offices of Robert J. Bezemek) for the union; Larry J. Frierson for the district. *Arbitrator:* Andria S. Knapp.

Issue: Did the district violate the agreement when it denied reimbursement for expenses claimed in connection with the union negotiator's attendance at a union conference?

Union's position: (1) The district violated the contract when it did not approve the union negotiator's request for reimbursement of travel expenses for a union conference he had attended on approved paid leave. Although the union representatives on the joint committee voted to approve reimbursement, the district's representatives did not. The district's vice president declined to fund union conference-related travel expenses and denied the request.

(2) The contract states the district "shall" grant up to two days of paid leave each year for three representatives to attend union conferences. It provides \$30,000 for travel costs and requires the district to reimburse such expenses for "all approved conference leaves." No distinction is made between union conference leave and other conference leave. The language is clear and unambiguous.

(3) The parties have a longstanding and consistent practice of reimburs-

ing travel expenses for union-related conference leave. Before it unilaterally changed its practice in 2007, the district had approved reimbursements of travel expenses for multiple union representatives for different types of union conferences for at least 14 years.

(4) When the district negotiated changes to the language in 2001, it did not request to negotiate a change in the travel expense reimbursement practice.

(5) The district's reasons for denying expense reimbursement for union-related conferences have varied, but none has any basis in the contract. The district originally stated it would not fund union activities. Now it states that union conferences do not meet the criteria for other kinds of paid conference leave. Even if the district's practice was to approve funding on a case-by-case basis, the denial of this funding request was discriminatory and arbitrary.

Employer's position: (1) The contract does not require the district to fund travel expenses to attend a union convention. The district has discretion whether to approve leave. The contract establishes a process by which a committee makes recommendations to the vice president on a case-by-case basis. If there is a split vote, the vice president makes the decision, subject to the approval of a board officer. This process would be unnecessary if there was a right to paid leave or travel reimbursement.

(2) The contract provision addressing money for travel expenses does not apply to the separate section on union-related conference leave. If the language is clear and unambiguous, past practice is irrelevant.

(3) There is no past practice that would eliminate the district's discretion to grant paid conference leave and travel expense reimbursement. Each past decision was made on a case-by-case basis after review of the criteria in the contract. The past decisions do not meet the prerequisites for proving a past practice. The union waived the practice when it did not arbitrate a 2007 denial or grieve a 2008 denial of travel expense reimbursement.

(4) If there is a practice, it includes the district's exercise of discretion. A series of discretionary decisions in an employee's favor does not bar the employer from exercising its discretion to reach a different result.

(5) The district's initial justification for denial of reimbursement of travel expenses was the result of a mistake by the new vice president. The mistake was immediately corrected.

Arbitrator's holding: Grievance sustained.

Arbitrator's reasoning: (1) Language in the union conference leave section that refers to the section governing other conference leaves, and vice versa, shows that the parties negotiated each provision in full cognizance of the other. The joint committee is given the responsibility to review union conference leave applications. The contract requires the committee to award travel expenses, within limits, for all approved conference leaves. The reference in the union conference leave section to "all other contract requirements" indicates the parties intended the travel reimbursement section to be applicable to union conference leaves.

(2) The contract is not clear and unambiguous, since the union conference leave section does not itself address travel expense reimbursement. But the committee has routinely awarded travel expense reimbursement for union conference leave since 1994. The negotiating history shows that the language has been in existence for years. In negotiations in 2001, the district was aware that travel expenses for union-related conferences were being reimbursed, but did not seek any change in the language. Only the amount of the reimbursement was changed.

(3) No change in this practice occurred until 2007, when the district announced that it would no longer pay for travel expenses for union conferences. The union immediately grieved. It grieved again in this case.

(4) The district's argument that it merely exercised its retained discretion over approval of conference leave in this case is unpersuasive. The contract requires an award of travel expenses for all approved conference leaves, subject to funding limits and the amount of reimbursement per unit member. There is no paragraph that retains ultimate discretion for the district.

(5) The joint committee approved the union conference leave. Once the request for leave was approved, the district was required to award travel expenses up to the maximum as long as conference travel money was available.

(Binding Grievance Arbitration)

- **Vacation Accrual**
- **Parity Clause**
- **Bargaining History**

County of Sacramento and Teamsters, Loc. 150 (12-21-09; 15 pp.). *Representatives:* Peter McEntee (Beeson Tayer & Bodine) for the union; Krista C. Whitman (supervising deputy county counsel) for the county. *Arbitrator:* Bonnie G. Bogue.

Issue: Did the county violate the collective bargaining agreement when it instructed managers to control supervisory employees' vacation accrual so as not to exceed the 400-hour maximum that results in cash-out payments?

Union's position: (1) The parties' contract and clear past practice demonstrate that employees, including supervisors, are entitled to cash out vacation accruals above the 400-hour maximum.

(2) The county violated the contract when it forced employees to schedule vacation or risk discipline, rather than providing payment for accrued vacation hours above the maximum.

(3) The county unlawfully eliminated supervisory employees' rights to vacation accrual cash outs without bargaining.

(4) The county could not unilaterally eliminate supervisors' rights to cash outs by taking that right away from unrepresented management employees.

County's position: (1) There is no established past practice of allowing cash-out payments of vacation accruals, and the board of supervisors permissively required agency and department heads to monitor vacation accrual cash outs by requiring employees to take vacation

to avoid reaching the maximum accrual level.

(2) When the board of supervisors amended the county code to eliminate the authorization for unrepresented classes to cash out accrued vacation leave, that change applied to supervisors by operation of the parity provision in their contract.

(3) During bargaining, the county negotiator never said that employees had an absolute right to reach the 400-hour cap and cash out accruals beyond that amount.

Arbitrator's holding: Grievance denied.

Arbitrator's reasoning: (1) The contract allows employees to accumulate a maximum of 400 vacation hours, but it is silent as to what occurs after an employee reaches that 400-hour maximum.

(2) Although past practice shows that employees were entitled to cash outs for time in excess of the 400-hour maximum, the county previously exercised its discretion to order employees to take earned vacation leave in order to avoid payment for accruals.

(3) The county has not treated the cash out of accruals beyond the maximum as a contractual obligation, but rather as a permissible way of implementing the contract that limits vacation accruals.

(4) The practice of paying supervisors for vacation accruals came about solely by operation of the parity clause in the supervisory unit's contract. When the county revised the ordinance to eliminate the right of unrepresented management employees to receive the cash out, supervisory employees no longer had that

option by virtue of the parity clause. The language in the parity clause covers downward adjustments in benefits, not only improvements.

(5) The parties' informal resolution of prior disputes does not show that the contract precludes the county from directing employees to take vacation leave rather than paying them for excess hours.

(6) Bargaining history that the county negotiator was not interested in allowing payouts for 200- rather than 400-hour accruals does not demonstrate that the negotiator admitted the county was contractually bound to make a payout after 400 hours, instead of requiring employees to take accruals as time off.

(7) The county was not required to negotiate before it stopped paying cash outs for vacation accruals. The parity clause requires that any change in vacation benefits of unrepresented management employees be provided to supervisory employees.

(Binding Grievance Arbitration)

- **Union Representation**
- **Released Time**
- **Past Practice**

County of San Diego and SEIU Loc. 221 (2-4-10; 11 pp.). *Representatives:* Courtney Barrett (labor relations officer) for the county; Fern M. Steiner (Tosdal, Smith, Steiner & Wax) for the union. *Arbitrator:* Frank Silver.

Issue: Did the county violate the memorandum of agreement when it denied released time to a union steward in the social welfare unit who represented an employee in the clerical bargaining unit?

Union's position: (1) A clear past practice demonstrates that stewards from one bargaining unit have represented employees in other bargaining units.

(2) Although county bargaining units have been represented by two different SEIU locals, the locals merged into Local 221. Following the merger, there is no basis for differentiating the units.

(3) Despite language in the memorandum of agreement that the provisions apply only to job classifications within that bargaining unit, the parties have consistently interpreted the contracts to permit cross-unit representation. The language addressing the rights of union stewards is materially the same in all MOAs and has been interpreted to allow cross-unit representation.

(4) The union steward and the grievant he sought to represent work for the same agency, in the same department, and at the same location.

(5) The steward is entitled to have the vacation hours used while attending the grievance meeting restored and charged as released time.

County's position: (1) The unambiguous language of the memorandum of agreement covering the social welfare unit permits a union steward to represent employees in his assigned work area but only if the employee is included in the social welfare unit.

(2) The memorandum of agreement covering the social welfare unit differs from the provisions in the other MOA.

(3) At no time during bargaining did the union voice an intent to broaden the representation rights of stewards to permit cross-unit representation.

(4) There is no open or acknowledged practice allowing stewards from the social welfare unit to represent employees in other bargaining units.

(5) In this case, the steward was permitted to represent the employee at the grievance meeting. He just was not granted released time to do so.

Arbitrator's holding: Grievance denied.

Arbitrator's reasoning: (1) There is no evidence that, prior to the merger of the two locals, a steward in one unit has represented an employee in another unit.

(2) The two MOAs were negotiated by separate locals and, pursuant to the recognition language in the contract, each MOA is only applicable to employees in the unit covered by that MOA.

(3) At the time the current MOAs were negotiated, the union locals were preparing for the merger, yet there is no evidence that cross-unit representation with released time was discussed during bargaining.

(4) The past practice relied on by the union concerns conduct that occurred after the merger and is of limited persuasiveness. Past instances where a steward has been designated as the representative of an employee in different bargaining units all occurred after the current grievance was filed. This does not reveal a past practice to support the instant grievance.

(5) Since the stewards who represented employees in other bargaining units did not claim released time, a past practice of permitting its use for cross-unit representation is negated.

(6) The one instance where a steward from the social welfare unit repre-

sented an employee covered by the other MOA is weak evidence of an ongoing, mutually recognized past practice and does not show the county's acquiescence to an interpretation of the contract that is inconsistent with the recognition clause.

(7) Provisions in the social welfare MOA extend different rights to union stewards than are provided in the other MOA and illustrate the difficulty of extending steward rights outside the social welfare MOA without negotiation.

(Binding Grievance Arbitration)

Public Employment Relations Board

Orders & Decisions

Summarized below are all decisions issued by PERB in cases appealed from proposed decisions of administrative law judges and other board agents. ALJ decisions that become final because no exceptions are filed are not included, as they have no precedent value. Cases are arranged by statute – the Dills Act, EERA, HEERA, MMBA, TEERA, the Trial Court Act, and the Court Interpreter Act – and subdivided by type of case. In-depth reports on significant board rulings and ALJ decisions appear in news sections above.

Dills Act Cases

Organizational Security Rulings

Window period for withdrawal of membership is extended after expiration of agreement until new agreement reached: CSLEA.

(*Edelen v. California Statewide Law Enforcement Assn.*, and *Lewis v. California Statewide Law Enforcement Assn.*, No. 2088-S, 12-31-09; 10 pp. + 11 pp. ALJ dec. By Member McKeag, with Members Neuwald and Wesley.)

Holding: An employee organization interfered with employee rights when it refused to honor requests to withdraw from membership after expiration of the MOU, which contained a maintenance of membership clause.

Case summary: The maintenance of membership clause in the MOU between CSLEA and the state permitted withdrawal from membership during the last 30 days before the agreement expired on June 30, 2008. The charging parties did not withdraw from membership before the agreement expired. CSLEA and the state continued to negotiate for a successor agreement, and no impasse was declared. In November 2008, the charging parties requested to discontinue membership but were denied because their requests were not made within the 30 days prior to June 30.

The ALJ did not consider the legislative history of Dills Act Sec. 3517.8, which provides that the terms of an

expired MOU continue in effect until a successor agreement is reached or the parties reach impasse. He found that Sec. 3517.8 did not change the limitation on maintenance of membership clauses imposed by Sec. 3513(i), which permits state employees to withdraw from membership within the last 30 days before an agreement expires. The ALJ reasoned that Sec. 3517.8 does not create a new MOU but only requires continuation of the status quo. The status quo permits withdrawals from union membership after expiration of the MOU, he decided, relying on *California State Employees Assn. (Fry)* (1986) Dec. No. 604-S, 71X CPER 14, and *California Union of Safety Employees (Trevisanut)* (1993) Dec. No. 1029-S, 105 CPER 69.

The board adopted the ALJ's proposed decision, although it found he should have considered the legislative history of Sec. 3517.8. PERB disagreed with CSLEA's interpretation of the effect of Sec. 3517.8 on the maintenance of membership provision. Both Secs. 3517.8 and 3513(i) are silent on how the maintenance of membership window period applies following a contract's expiration. CSLEA's interpretation of Sec. 3517.8 would completely extinguish the rights of state employees to resign from membership after expiration of a contract, the board noted. It found the facts analogous to those in *Fry*, where the board found that the parties' extension of an MOU also extended the window period for withdrawal from union membership. Since Sec. 3517.8 effectively imposes the contractual terms on the parties on a day-to-day basis until a successor agreement is reached, a request to withdraw after the MOU's expiration must be honored under Sec. 3513(i).

The board also rejected CSLEA's assertion that a showing of unlawful intent is necessary to find it interfered with employee rights. It reaffirmed its standard that interference is proven when at least slight harm to employee rights results from the respondent's conduct. The board turned aside CSLEA's claim that the case was not ripe for adjudication.

Window period for withdrawal of membership is extended after expiration of agreement until new agreement reached: CSLEA.

(*Morgan v. California Statewide Law Enforcement Assn.*, No. 2089-S, 12-31-09; 8 pp. + 9 pp. ALJ dec. By Member McKeag, with Members Neuwald and Wesley.)

Holding: Where the charging party requested withdrawal of membership in January 2009, the board reached the same conclusion as summarized above in *CSLEA (Edelen)*, Dec. No. 2088-S.

EERA Cases

Unfair Practice Rulings

Unfair practice charge must allege wrongful conduct for repugnancy review of arbitrator's decision: Ventura County Federation of College Teachers, AFT Loc. 1828.

(*Ventura County Community College Dist. v. Ventura County Federation of College Teachers, AFT Loc. 1828*, No. 2082, 12-09-09; 5 pp. + 7 pp. R.A. dec. By Member Wesley, with Members McKeag and Neuwald.)

Holding: The charging party failed to allege any conduct by the federation that violated EERA, and therefore did not establish a prima facie case.

Case summary: The federation filed an unfair practice charge against the district, alleging a unilateral change/transfer of work out of the bargaining unit. The matter was deferred to the parties' grievance and arbitration process, and an arbitration decision was issued in favor of the federation. The district then filed an unfair practice charge against the federation, alleging the arbitration decision was repugnant to EERA. It asked PERB to review it pursuant to Sec. 3541.5(a)(2).

The board explained that where, as here, an unfair practice charge alleges conduct that would also violate the parties' CBA, and is subject to binding arbitration, the board will defer to the grievance and arbitration process. And, while the act grants the board the authority to review the resulting arbitration award to determine whether it is

repugnant to the purposes of the act, the board's authority remains limited to the issuance of a complaint that alleges conduct which violates the act.

In this case, the district's charge did not allege any wrongful conduct by the federation. Rather, it referred to a previous unfair practice charge that was filed by the federation against the district. "Essentially," said the board, "the District is seeking an independent review of the arbitrator's decision so as to re-litigate before PERB the matters dealt with in arbitration. This is beyond the purpose and scope of the statute."

The district's argument that Sec. 3541.5(2) establishes an independent mechanism for either party to challenge an arbitrator's decision based solely on a claim that a third-party arbitration decision is repugnant to the act was rejected.

Retaliation charge untimely, failed to state a prima facie case: Garden Grove USD.

(*DeRuiter v. Garden Grove Unified School Dist.*, No. 2086, 12-28-09, 6 pp. + 12 pp. R.A. dec. By Member Neuwald, with Acting Chair Dowdin Calvillo and Member Wesley.)

Holding: The charge was untimely with respect to all allegations of unlawful conduct occurring more than six months prior to filing the charge. The continuing violation doctrine does not apply because the charging party did not establish that the district's conduct within the statutory period was an independent violation of EERA. The charging party did not state a prima facie case of retaliation because she failed to show a nexus between her protected activity and the alleged adverse actions.

Case summary: The charging party, a teacher and a campus grievance representative for the teachers association, alleged in her April 2009 charge that she engaged in protected activity in March 2006, by talking to her supervisor about access to bathroom facilities for bargaining unit members after school and on weekends. After this discussion and from 2006 to 2008, she received six negative performance evaluations, two letters of concern, and was placed in the peer assistance review program.

In an amended charge, she also alleged that she engaged in protected activity by helping to set up, and participating in, a faculty advisory committee from April 2007 to October 2008, and by filing grievances in spring 2008 and February 2009. She alleged that the district took adverse action against her when it gave her four negative performance reports between December 2008 and April 2009, and denied her transfer requests in November 2008 and June 2009. The district rated her performance as unsatisfactory in May 2009.

The board adopted the R.A.'s decision, supplemented by its own discussion.

It agreed with the R.A. that the allegations of retaliation which occurred more than six months prior to the filing of the charge could not be considered as separate violations absent an independent violation within the statutory period. PERB also agreed that the charging party's complaint to her supervisor about bathroom access was protected activity. But, unlike the R.A., it found unclear whether she was acting in her capacity as a union representative. However, because EERA recognizes a protected right of self-representation, the board concluded that her complaints were protected.

The board also agreed with the R.A. that the charging party failed to present sufficient facts to establish that one of the primary purposes of the faculty advisory committee was to represent employees in their employment relationship with their employer. Therefore, her participation in that committee was not protected by EERA Sec. 3543(a).

The board adopted the R.A.'s finding that the filing and processing of grievances constitutes protected activity.

The adverse actions that fell within the statutory period occurred close in time to grievance filing, noted the R.A. However, temporal proximity alone is not sufficient to establish a nexus between the protected activity and the adverse actions. The charging party failed to allege facts to further demonstrate nexus.

Charging party's complaints on his own behalf were not protected activity: San Joaquin Delta CCD.

(*Stott v. San Joaquin Delta Community College Dist.*, No. 2091, 1-29-10, 4 pp. + 12 pp. R.A. dec. By Member Neuwald, with Acting Chair Dowdin Calvillo and Member McKeag.)

Holding: The charging party did not state a prima facie case of discrimination because he failed to establish that he engaged in protected activity under EERA.

Case summary: The charging party is an adjunct psychology professor. In October 2008, when the district reduced the number of classes he was teaching from three to one, he complained to his supervisor and the district's vice president of instruction. In June 2009, the district cancelled his one remaining class "due to budget restraints." Again, the charging party complained. In September 2009, the charging party received an email from his supervisor asking if he was interested in teaching a class at another campus.

The charge, filed on September 9, 2009, alleged that the district discriminated and retaliated against him for complaining when it cut his classes, cancelled his only remaining class, and offered him a class in a different location. The R.A. dismissed the allegation regarding the classload reduction as untimely because the cut had occurred more than six months before the charge was filed. The R.A. found that his complaint about unfair working conditions was conduct that "falls squarely under the right for employees to represent themselves individually in their employment relations protected by EERA section 3543(a)." But, he had not established a nexus between that activity and the district's cancellation of his classes. Nor, according to the R.A., did the charging party establish that offering him the opportunity to teach a class at another location was an adverse action. The R.A. dismissed the remaining allegations for failure to state a prima facie case.

The board affirmed the R.A.'s dismissal of the charge, but disagreed with the R.A.'s conclusion that the charging party had engaged in protected activity. While "PERB has held that individual complaints related to employment matters made by an employee to his superior are protected,"

that is only true when those complaints “are a logical continuation of group activity,” it said, citing *County of Riverside* (2009) No. 2020-M, 196 CPER 89, and *Los Angeles Unified School Dist.* (2003) No. 1552, 164 CPER 107.

“Where, however, an employee’s complaint is undertaken alone and for his/her sole benefit, that individual’s conduct is not protected.” The board determined that was the case here.

District unlawfully changed bus drivers’ assignments and compensation policies: Desert Sands USD.

(*California School Employees Assn., Chap. 106 v. Desert Sands Unified School Dist.*, No. 2092, 2-1-10, 35 pp. dec. By Member McKeag, with Acting Chair Dowdin Calvillo and Member Neuwald.)

Holding: The district unlawfully changed policies within the scope of representation when it transferred work from one position to others, changed its policies regarding field-trip work, and altered its practice regarding training compensation for bus drivers. The district did not unlawfully change the duties of bus mechanics.

Case summary: When the district laid off all of its health technicians, it transferred toileting and other personal assistance duties to paraeducators, and catheterizations and other invasive procedures to school nurses, outside the bargaining unit. The board concluded that these transfers of work were negotiable, and that the district breached its duty to bargain under EERA by failing to negotiate the transfer of work.

The board found the district unilaterally changed its policy that permits the district to assign charter buses for field trips without first considering the availability of district buses and drivers. If, in doing so, it booked charter buses when district buses and drivers were available, it deprived drivers of work contemplated by previous board policy and the CBA. “This reduction in work opportunities clearly constitutes a reduction in wages and is, therefore, a matter within the scope of representation,” under EERA Sec. 3543.2. The board held that the district breached its duty to bargain when it changed its policy in violation of EERA Sec. 3543.5 (c).

Although there was no contractual obligation for the district to pay its bus drivers for behind-the-wheel training time, the association established a past practice of doing so through the uncontroverted testimony of witnesses, said the board. The district’s unilateral change in policy to deny payment for this training violated its duty to bargain.

The district did not violate its duty to bargain when it changed the way work was assigned to bus mechanics. Previously, the lead vehicle equipment mechanic determined the mechanic to whom work should be assigned. When the lead position was discontinued, the work was redistributed by assigning each mechanic responsibility for the maintenance and repair of a fleet of buses. The board found that the reassignment was a managerial prerogative and not subject to bargaining. The tasks assigned were within the duties of the classification as established in the job description. The board rejected the association’s claim that the change was negotiable because it imposed additional work on the mechanics. PERB found the mechanic’s overtime was attributable to a shortage of bus drivers and mechanics being assigned to drive bus routes.

Representation Rulings

Grant of request for recognition for unit of substitute teachers upheld: CWA, AFL-CIO.

(*Santa Ana Unified School Dist. v. Communication Workers of America, AFL-CIO*, No. Ad-383, 2-23-10; 4 pp. + 15 pp. R.A. dec. By Member Neuwald, with Acting Chair Dowdin Calvillo and Member Wesley.)

Holding: A unit exclusively composed of substitute teachers is an appropriate bargaining unit.

Case summary: The union filed a request for recognition with the district under PERB Reg. 33050, seeking to represent a unit of substitute teachers employed by the district. The R.A. granted the request, and the district appealed. It argued there is no practical purpose for a stand-alone unit of substitute teachers, no potential benefit to substitute teachers being part of a bargaining unit given California’s severe financial crisis, and that the parties would

be unable to determine who belongs in the unit given the transitory nature of substitute teaching.

The board adopted the R.A.'s decision as its own, subject to additional discussion.

It rejected the district's arguments that the substitute teachers were misled by union recruiters because the union would not be able to negotiate any benefit on their behalf and that the district would expend valuable resources if required to bargain with the union.

EERA guarantees all covered employees the right to select an employee organization as their representative in an appropriate unit. It is well established that substitute teachers are covered by EERA. While they may be included in a broader unit of teachers, a unit of only substitute teachers may also be appropriate. PERB noted that the union serves as the exclusive representative of the district's permanent teachers and has never attempted to modify the unit to include substitute teachers, nor did it attempt to intervene to challenge CWA's petition in this proceeding.

"PERB's role in this proceeding is not to evaluate the wisdom of the decision of a majority of the employees in a proposed unit to select CWA as their bargaining representative, or whether CWA will be able to negotiate favorable terms and conditions of employment on their behalf," the board explained. "We are charged solely with determining whether sufficient proof of support exists to certify CWA as the exclusive representative of an appropriate bargaining unit and thereby confer an obligation to meet and negotiate in good faith." The board found that a stand-alone unit of substitutes in this case satisfies EERA requirements.

The R.A. found, and the board agreed, that an employer's operational efficiency cannot outweigh employee representation rights when employees have no other options for representation.

Further, noted the board, the district presented no authority to support its argument that substitute teachers are not entitled to representation in collective bargaining because the nature of their employment is "transitory." To the contrary, PERB has long recognized that substitute teachers have collective bargaining rights conveyed by EERA.

Duty of Fair Representation Rulings

Union activities in furtherance of contract ratification did not violate DFR in obtaining member ratification: Santa Ana Educators Assn.

(*O'Neil et al. v. Santa Ana Educators Assn.*, No. 2087, 12-30-09, 22 pp. dec. By Member Neuwald, with Members McKeag and Wesley.)

Holding: The charging parties failed to show that the union's conduct in obtaining ratification of a contract was arbitrary, discriminatory, or in bad faith, or that it was without a rational basis or devoid of honest judgment.

Case summary: The union reached tentative agreements with the district that provided for a three-year successor agreement with two reopeners. The tentative agreements included a 4 percent annual salary reduction.

The charging parties alleged that, at informational meetings held by the union before the ratification vote, the union prevented one of them from speaking against ratification. They also alleged that union representatives made misrepresentations of fact to secure ratification of the tentative agreements, failed to provide adequate opportunity for members to consider and comment on the tentative agreements, failed to follow union bylaws regarding ratification, prevented members from distributing materials opposed to ratification, and agreed to the tentative agreements without a rational basis.

The board found that the charging parties failed to allege sufficient facts to show how the union's action or inaction was without a rational basis or devoid of honest judgment and, therefore, failed to state a prima facie case of a violation of the duty of fair representation. The board noted that, under EERA, a union "enjoys a wide range of bargaining latitude" and "is not expected or required to satisfy all members of the unit it represents."

The board concluded that the charging parties failed to show a breach of the duty of fair representation by misrepresenting facts to secure contract ratification. To do so, the charge must establish that the union made an untrue assertion of fact knowing it to be false, that the assertion was

made to secure ratification, and that the misrepresentation had a substantial impact on the unit members' relationship with their employer. The facts in this case failed to show the union made the assertion that contract ratification would help save the class-size reduction program with knowledge that the statement was false. Its statement that, absent ratification, the state would take control of the district, merely was an opinion as to what might happen. The parties could not show the union had said the contract would be nullified in the event of a state takeover. Nor could statements made after ratification be used to demonstrate that the remarks were made to obtain ratification.

The charging parties failed to demonstrate that the attempt to disallow one of them to speak at an informational meeting had a substantial impact on their employment relationship with the district, concluded the board. Nor did the union's alleged failure to comply with its bylaws have such an impact.

The charging parties' allegation that the union failed to consider the impact of a ballot measure which generated more income for the district or to take into account a 1.4 percent COLA in making district budget projections, did not show that the union's conduct was arbitrary, discriminatory, or in bad faith.

No DFR breach or retaliation claim: CTA, Solano Community College Chap.

(*Tsai v. California Teachers Assn., Solano Community College Chap.*, CTA/NEA, No. 2096, 2-4-10; 14 pp. dec. By Member Wesley, with Acting Chair Dowdin Calvillo and Member McKeag.)

Holding: The charging party failed to show that the association had no rational basis for refusing to take her grievance to arbitration or that it made its decision because she had filed her own grievance.

Case summary: The charging party alleged that the association breached its duty of fair representation by failing to submit her grievance to arbitration and that its refusal to do so was retaliation in violation of EERA for filing a grievance on her own behalf.

In her grievance, the charging party alleged that the district violated the CBA when it gave her first choice for a summer assignment to a coworker with less seniority and when her request for an additional four-hour shift was denied by her supervisor. The charging party asked the association to file a grievance. When she received no response, she hired an attorney to file it.

The association investigated the grievance and found that the district had followed established practice in making the summer assignments, and there was no violation of the CBA. As to the second issue, the union was taking to arbitration a coworker's grievance that addressed a similar issue.

The board found that the association had a rational basis for not bringing the grievance to arbitration and did not breach its duty of fair representation. It also noted a union has discretion to decide in good faith that even a meritorious grievance should not be pursued.

Regarding the claim of retaliation, the board found that EERA Sec. 3543 grants public school employees the right to self-representation with their employer, and that the charging party did engage in protected activity when she presented her grievance herself. However, it found that the charging party provided insufficient evidence to show a nexus between the protected activity and the association's refusal to arbitrate her grievance, thereby failing to state a prima facie case of reprisal.

HEERA Cases

Unfair Practice Rulings

Charge alleging failure to meet and discuss health benefits untimely: U.C. Los Angeles and San Diego.

(*State Employees Trades Council United v. Regents of the University of California [Los Angeles and San Diego]*, No. 2084-H, 12-24-09; 2 pp. + 10 pp. B.A. dec. By Member McKeag, with Members Neuwald and Wesley.)

Holding: The charge alleging failure to meet and discuss health benefits was untimely since it was filed more than six months after the university closed the open enrollment

period. The union also failed to allege facts showing the university refused to meet and discuss changes to employee premium contributions within the statute of limitations.

Case summary: The charging party is the exclusive representative of the skilled crafts units at the San Diego and Los Angeles campuses. In both collective bargaining agreements, the union has the right only to meet and discuss changes to U.C.'s systemwide health benefits program.

In August 2006, the union learned that the university was entering final negotiations with the health insurance companies. It demanded to meet and discuss health benefits before the insurance company negotiations became final. The university told the union that a meeting would be premature, but promised to provide premium rate and benefits information as soon as it became available. The union demanded that any rate increases be postponed for skilled trades employees, similar to postponements the university had agreed to for other bargaining units, but the university was non-committal.

In October, after the information was made available to employees at the end of September, the university informed the union it was raising premium rates. The parties met after November 1, when the month-long open enrollment period began. In response to several union inquiries, the university stated it would provide information but that it was too late to change the new rates or benefits. The union alleged the university failed to respond timely to requests for information before several meetings, including the last one on December 12, 2006.

The union filed a charge on June 22, 2007, alleging that the university failed to meet and discuss benefit changes in good faith before implementing them January 1, 2007. The union alleged the university refused to meet in August and failed to provide information by December 12, the B.A. noted, but no allegations referred to misconduct that occurred within six months before the charge was filed.

Because the statute of limitations begins to run when the charging party knew or reasonably should have known that the employer was going to make a change without good faith discussion, the B.A. dismissed the charge as untimely.

The B.A. rejected the union's contention that because the university led it to believe that it was acting in good faith, the union had no reason to know a good faith discussion would be impossible until the university implemented changes on January 1. The union should have known that the university would not meet and consult in any meaningful way by the end of the open enrollment period on November 30, when it effectively implemented benefit changes. The B.A. also rejected the contention that *Regents of the University of California (Bawal)* (1999) Dec. No. 1354, governed the university's duty to provide requested information for meaningful meeting and discussion before implementation.

Interference with right to file grievances not proven: Trustees of CSU San Marcos.

(*Pelonero v. Trustees of the California State University [San Marcos]*, No. 2093-H, 2-2-10; 4 pp. + 8 pp. ALJ dec. By Acting Chair Dowdin Calvillo with Members Neuwald and Wesley.)

Holding: The charging party did not prove by a preponderance of the evidence that management employees interfered with his right to file grievances. The statute of limitations was tolled by the filing of a grievance concerning the same conduct underlying the unfair practice charge.

Case summary: The charging party has filed numerous grievances against the university concerning contracting out of bargaining unit work. In October 2006, supervisory and managerial employees met with several employees, including a coworker, Williams, but not the charging party. Williams testified that managerial employees told supervisors to encourage the employees to put pressure on the charging party and other grievants. The supervisor and lead employee told the employees in attendance that the department did not like the charging party and others filing grievances every time a contractor was on campus. They explained that management wanted union members to discourage the filing of more grievances.

Although the ALJ found Williams' testimony credible, the testimony of four other witnesses contradicted it. The lead employee and the supervisor testified that no management employee told them there was a need to

pressure the charging party not to file grievances. The supervisor testified he did not tell any employees to pressure the charging party. One managerial employee testified he did not give the alleged instructions. And another manager attested that nothing was said about putting pressure on the charging party. The ALJ found that their testimony outweighed Williams' evidence, in part because none of the other rank-and-file employees at the meeting corroborated Williams' testimony.

The board adopted the ALJ's proposed decision. It deferred to the ALJ's credibility determination. It also held that the unfair practice charge, which was filed 18 months after the October 2006 meeting, was timely. A grievance that the conduct at the meeting interfered with the charging party's rights had been filed and was pending at the time the charge was filed. The filing of the grievance tolled the six-month statute of limitations period.

Removal of unit work without notice is unlawful unilateral change: U.C. Davis.

(*Coalition of University Employees v. Regents of the University of California [Davis]*, No. 2101-H, 3-1-10, 43 pp. dec. By Acting Chair Dowdin Calvillo, with Members McKeag and Neuwald.)

Holding: U.C.'s breach of a contract provision requiring notice to the union when the university proposed to replace a unit position with a non-unit position was a change in policy. Notice of a change in policy must be given to a union official, not to unit employees. The university had a duty to provide or disclose the website location of relevant information regarding non-unit positions.

Case summary: On appeal by the university, the board decided five consolidated cases in which the university transferred work from a bargaining unit position to a position outside the unit when the unit position was vacated.

PERB decided the first case was not timely filed. On December 20, 2005, the union representative received information that should have alerted her that the university may have violated the contract provisions governing reclassification of positions outside the unit, but she did not file a charge until more than six months later on July 14, 2006.

In a second case, an employee, Pearson, vacated an assistant III position. In April 2005, the university reposted the position as an analyst position, outside CUE's unit, but did not notify the union. Employees in the unit noticed that most of the duties of the new analyst position were the same as the vacated position. The union received a response to its request for a job description for the vacated position on October 11, 2005, and filed a charge on November 29. The board found the charge was timely filed because notice of a change must be given to a union official. Knowledge of employees in the unit is not imputed to the union.

The university contended the contract did not require it to notify CUE when the duties of a vacated position were reclassified out of the unit, only when it proposed to move filled positions out of the unit. But PERB found the university's interpretation was not supported by the plain and unambiguous language of the contract or by a prior arbitration decision. Because U.C. insisted it was not required to do what the contract clearly required, and indicated it would continue to apply its interpretation in the future, the board found the contract breach was a change in policy. PERB also found the change concerned a matter within the scope of representation.

The board found that the university intended to transfer Pearson's work to a non-unit position and had a duty to notify CUE under the contract. Since U.C. failed to notify CUE, PERB held U.C. had made an unlawful unilateral change.

In a third case, an administrative assistant II worked at a reception desk with two other employees. He trained Vaitai, an individual who worked in a position outside the bargaining unit at a different reception area as a medical office services coordinator III, to perform his duties. After he left his position, Vaitai left her reception area and began to perform his duties. Another MOSC was hired to replace her. The board found that the university intentionally transferred the administrative assistant's duties to a position outside the unit. Since U.C. did not notify CUE of the replacement of bargaining unit work, PERB found it made an unlawful unilateral change.

In a fourth case, two administrative assistants in the bargaining unit performed grant administration tasks for professors. When one left, U.C. hired the second administrative assistant into a non-unit administrative specialist position to perform her previous work and some of the work previously done by the first administrative assistant. A second non-unit specialist was then hired to take over the remainder of the work. PERB found the university made an unlawful unilateral change when it failed to give notice of its intention to replace unit work.

PERB held that U.C. did not make an unlawful unilateral change in the fifth case. During a hiring freeze, the university hired a student to perform some of the duties of a vacated half-time administrative assistant position as well as tasks customarily assigned to students. Eventually, the university hired a new administrative assistant for the work. Although the student had been performing some of the administrative assistant duties, PERB found the university did not breach the contract, which required notice to the union only if it decided to replace at least 50 percent of the duties of a unit position with non-unit duties. Because U.C. used the student only during a hiring freeze, the board also did not find the university intended to transfer the work out of the unit.

CUE also charged the university with refusal to provide information. U.C. contended that it was not required to provide job vacancy listings, job descriptions, or classification history about non-unit jobs. The board held that the university was required to provide such information because it was relevant to the allegations of wrongful removal of unit work. Although U.C. asserted it had no database that tracked the vacancy history of positions, the university failed to provide sufficient evidence that CUE's requests were unduly burdensome. PERB found the evidence could have been provided with reasonable diligence. The board found insufficient evidence to support U.C.'s argument that all the information was equally available to CUE from the university's website. Although some of the information was there, the university failed to inform CUE exactly where it could be found.

Duty of Fair Representation Rulings

Charge failed to allege facts showing DFR breach: CUE.

(*Hall v. Coalition of University Employees*, No. 2095-H, 2-4-10; 8 pp. dec. By Acting Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The charging party did not allege facts showing that the union discriminated against her or breached its duty of fair representation when it opposed reclassifying her position out of the bargaining unit. There was no good cause to consider new allegations on appeal.

Case summary: The charging party's employer, the University of California, proposed to reclassify the charging party's position from administrative assistant III to analyst I. In April 2008, U.C. notified the Coalition of University Employees, the union representing administrative assistants, of its proposal and attached a proposed job description for the reclassified position. Under the parties' collective bargaining agreement, the union has 30 days to challenge the reclassification.

CUE opposed the reclassification because it believed that the charging party, Hall, was performing bargaining unit work. It did encourage a raise for Hall to a salary equivalent to an analyst's pay. CUE and U.C. met about the reclassification without informing Hall. In June, a CUE representative emailed Hall that the union believed she and several other administrative assistants were doing bargaining unit work, and that it was litigating the issue before PERB. The representative stated that the union recommended to U.C. that it pay her the equivalent salary as an analyst I. The union did not comply with Hall's request to meet with her or provide her a copy of its written rejection of her proposed reclassification.

In December 2008, Hall filed a charge alleging that CUE breached its duty of fair representation by opposing the reclassification. The board agent dismissed the charge because it alleged no facts showing a breach of the duty. Hall appealed.

PERB reiterated board precedent that an exclusive representative does not breach the duty of fair representation by taking a position that is unfavorable to an individual employee but beneficial to the bargaining unit as a whole. It found that CUE had a rational interest in ensuring that bargaining unit work remain in the unit because such a removal weakens the strength of the employees and their ability to deal effectively with the employer.

The board rejected Hall's claim that CUE's decision was not based on an honest judgment because its representatives did not review the proposed job description. There was evidence a copy of the job description was attached to U.C.'s notice, and there were no facts alleged that showed CUE did not review it. Because CUE took the same action in response to proposals to reclassify other administrative assistant positions, the board found no allegations that demonstrated discrimination against Hall.

Hall raised a new argument that CUE breached its duty by failing to pursue higher compensation for out-of-class work she was performing. She newly alleged that she learned from a December 1, 2008, email that the union had not pursued a higher salary for her. The board, however, found no good cause to consider the new contention because Hall received the email before she amended her charge in January 2009. It dismissed the unfair practice charge.

MMBA Cases

Unfair Practice Rulings

Charging party's appeal of dismissal insufficient: City of Brea.

(*Coffman v. City of Brea*, No. 2083-M, 12-9 -09; 3 pp. By Acting Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The charging party failed to allege sufficient facts to show that the city discriminated against him.

Case summary: The charging party alleged that the city's refusal to hire him was for discriminatory reasons in

violation of the MMBA. The board agent dismissed the charge, finding the charging party lacked standing, the charge was untimely, and the allegations failed to state a prima facie case.

The charging party's appeal of the B.A.'s dismissal merely stated that he "excepts to the dismissal of his charge and appeals said dismissal." Relying on PERB precedent, the board found that the appeal failed to comply with PERB Reg. 32635(a), which requires the appellant to identify specific issues or parts of the dismissal to which appeal is taken or to state grounds for the appeal. Having failed to do so, the board affirmed the B.A.'s dismissal.

Union's request to bargain did not adequately reference its desire to negotiate "effects" of decision: County of Riverside.

(*Laborers International Union of North America, Loc. 777 v. County of Riverside*, No. 2097-M, 2-10 -10; 16 pp. By Member Wesley, with Acting Chair Dowdin Calvillo and Member McKeag.)

Holding: The charging party failed to request to negotiate the effects of the county's decision to change a compensation plan and therefore waived its right to bargain.

Case summary: The charging party alleged that the county unilaterally discontinued part of a performance and competency plan without providing the union with notice and an opportunity to bargain. As a result, information technology employees were no longer permitted to earn competency pay by qualifying for "hot skills" pay.

The ALJ determined that the county had violated the MMBA and a local rule. The county filed exceptions.

The board first rejected the county's claim that it improperly was required to defend against an unalleged violation because the ALJ had improperly restated the issue. Relying on the test articulated in *Fresno County Superior Court* (2008) No. 1942-C, 189 CPER 93, the board found the issue stated by the ALJ was fully litigated by the parties and the county had ample opportunity to defend its position.

Contrary to the ALJ, however, the board found that the county had no obligation to bargain over the decision to

discontinue the pay plan; it was required to negotiate only the effects of the decision. PERB determined that the union had been provided notice and an opportunity to bargain over the effects. The board examined the union's request to bargain over the decision. Although the union asserted in its request that the change could impact its members' salaries, the board found this did not indicate, or put the county on notice of, a clear desire to negotiate the effects of the decision as opposed to the decision itself.

PERB follows court's ruling that interest arbitration law is unconstitutional: County of Sonoma.

(*Sonoma County Law Enforcement Assn. v. County of Sonoma*, No. 2100-M, 2-25-10; 16 pp. By Member Neuwald, with Members McKeag and Wesley.)

Holding: The county was not required to engage in binding interest arbitration because the appellate court ruled that the statute is unconstitutional. The terms of employment implemented by the county were reasonably contemplated in its final offer.

Case summary: The charging party alleged that the county failed to submit to binding interest arbitration prior to implementing its last, best, and final offer pursuant to Code of Civil Procedure Secs. 1299 et seq. The ALJ found the county's conduct unlawful.

While this case was pending before PERB, the First District Court of Appeal decided *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 196 CPER 31, which held that the statewide statutory provision mandating the use of interest arbitration to resolve bargaining impasses involving law enforcement employees was an unconstitutional delegation of authority to an arbitration panel. Based on this ruling, the board reversed the ALJ's proposed decision that the county had unlawfully refused to participate in the arbitration procedure.

The board agreed with the ALJ's conclusion that the terms and conditions of employment implemented by the county after impasse were reasonably contemplated within its last, best, and final offer.

Duty of Fair Representation Rulings

Union's bargaining position on layoffs falls within wide latitude of is negotiation authority: Stationary Engineers Loc. 39.

(*May v. Stationary Engineers Loc. 39*, No. 2098-M, 2-10-10; 8 pp. By Member Wesley, with Members McKeag and Neuwald.)

Holding: The union's conduct was a matter of internal affairs and did not impact the unit employees' relationship with the employer. The union's bargaining proposal regarding layoffs did not breach its duty of fair representation.

Case summary: In 2009, the City of Auburn and the union engaged in negotiations over proposed layoffs. Following a meeting with bargaining unit members, an advisory vote opted in favor of a reduction in pay in lieu of layoffs. Nonetheless, the union submitted a proposal for layoffs rather than furloughs. The charging party directed several emails to union officials requesting information on its bargaining position and unsuccessfully sought a special meeting to vote on the proposal pursuant to union bylaws.

The board found that the charging party's allegations concern matters of internal union affairs. The union's duty of fair representation does not attach to internal union matters absent a showing that there is a substantial impact on the relationship between employees and the employer. In this case, the board found no indication that the conduct of the union impacted the employer-employee relationship.

The board also rejected the charging party's assertion that the union was required to comply with the advisory vote of its members, supporting furloughs rather than layoffs. Noting that the exclusive representative enjoys a wide range of bargaining latitude, that the union is not expected to satisfy all members of the unit, and that the union may make an agreement that has an unfavorable effect on some members of the unit, the board found no facts to establish that the union's bargaining position was arbitrary, without a rational basis, or devoid of honest judgment.

Trial Court Act Cases

Unfair Practice Rulings

Complaint to issue where courts gave independent contractor interpreters more favorable conditions than employee interpreters: Region 2 Court Interpreter Employment Relations Committee.

(*California Federation of Interpreters-TNG/CWA v. Region 2 Court Interpreter Employment Relations Committee*, No. 2099-I, 2-25-10; 11 pp. By Member McKeag, with Members Neuwald and Wesley.)

Holding: The union's allegations establish a prima facie case that the respondent courts violated the act when they paid independent contractors more than employee court interpreters and did so to discourage independent contractors from applying for pro tempore interpreter jobs.

Case summary: The charging party alleged that superior courts within Region 2 violated the act when they provided more favorable terms and conditions of employment to independent contractors than they did to court employees. Reversing the board agent, PERB found that the employee organization stated a prima facie case of discrimination.

Section 71802(c)(3) of the act states that hiring independent contractors with lesser duties or more favorable conditions is a violation of the act if it is done for the purpose of discouraging interpreters from applying for employment with the courts. A violation of this section requires a showing of unlawful motive. At a minimum, PERB said, the employee organization must show that it is more likely than not that the employer's actions were based on a prohibited discriminatory criterion.

To establish a prima facie case, the charging party must show that an independent contractor was afforded lesser duties or more favorable working conditions than an employee interpreter, and that the employer's disparate treatment was for the purpose of discouraging independent contractors from applying for employee interpreter jobs. As is the case with other statutes enforced by PERB, the board must assume that the factual allegations in the charge

are true for the purpose of assessing whether a prima facie case has been charged. Following a formal hearing, the employer may present evidence that its disparate treatment was taken for a legitimate reason notwithstanding evidence of unlawful motive.

Based on the alleged facts in this case, PERB found that the Monterey and Sonoma County superior courts afforded more favorable working conditions to independent contractor interpreters when they paid them nearly twice as much as employee interpreters, denied an employee interpreter an assignment awarded to an independent contractor, and changed premium pay policies for employees but not independent contractor interpreters. The magnitude of the pay disparity and the unilateral implementation of premium pay policies demonstrated evidence of unlawful motive.

The board remanded the case to the general counsel for issuance of a complaint.

Activity Reports

ALJ PROPOSED DECISIONS

Sacramento Regional Office — Final Decisions

SEIU Loc. 1000 v. State of California (Secretary of State), Case SA-CE-1620-S. ALJ Christine A. Bologna. (Issued 2-17-10; final 03-16-10, HO-U-979-S.) SEIU is the exclusive representative of employees in bargaining unit 4 (Office & Allied). Sandra Smith has been active in SEIU for over 10 years; she was the chief steward for a district labor council, a general council delegate, and an elections committee member. Smith was on paid union leave, conducting union business one day a week, through June 2007. Smith engaged in protected activities by reporting a threat by her supervisor to an SEIU labor relations representative, assisting the union representative in filing a grievance, counting ballots in a union election, and participating in filing a grievance over the denial of three sick leave days. Management took adverse action against Smith when it denied her sick leave request, placed her on involuntary paid administrative leave pending two fitness-for-duty evaluations, and issued her a notice of an official reprimand.

No violation was found. Although protected activity, adverse action, and employer knowledge were established, the charging party failed to demonstrate that the employer took adverse action against Smith because of her protected activity. Only timing is present as an indication of nexus as Smith engaged in continuous protected activities for 18 months. Shifting justification, cursory investigation, or failure to follow usual procedures was not established. Even if a prima facie case of discrimination/retaliation had been shown, the employer established a non-discriminatory, legitimate business reason for taking adverse actions against Smith, even absent protected conduct.

Oakland Regional Office — Final Decisions

None during this period.

Los Angeles Regional Office — Final Decisions

Council of Housing Professionals v. Housing Authority of the City of Los Angeles, Case LA-CE-467-M. ALJ Thomas J. Allen. (Issued 01-25-10; final 02-23-10, HO-U-978-M). There was no finding of a failure to bargain the effects of layoffs. The city negotiator testified that bargaining ended in agreement.

The union's negotiator testified otherwise. Other evidence, including the union's failure to request further bargaining, supported the city's testimony.

Kruger v. IUOE Loc. 501, Case LA-CO-123-S. ALJ Thomas J. Allen. (Issued 01-28-10; final 04-07-10, HO-U-980-S.) There was no finding of the violation of the duty of fair representation. Evidence showed disagreement on contract interpretation, not arbitrary conduct or a failure to communicate.

SEIU Loc. 1000 v. State of California (Dept. of Corrections & Rehabilitation), Case LA-CE-657-S. ALJ Thomas J. Allen. (Issued 03-04-10; final 04-07-10, HO-U-981-S.) There was no finding of retaliation against the union steward. The delay in the move and reassignment were not shown to be adverse actions. Union activities were not shown to be widely known or to be a factor in non-promotion.

Sacramento Regional Office — Decisions Not Final

California Correctional Peace Officers Assn. v. State of California (DPA), Case SA-CE-1621-S. ALJ Christine A. Bologna. (Issued 3-11-10; exceptions filed 04-05-10.) The 2001-06 unit 6 agreement between CCPOA and the state provided paid release time for a variety of reasons. Successor negotiations that began in May 2006 reached impasse, and PERB appointed a mediator. On August 22, 2007, CCPOA withdrew from mediation and the state submitted a voluminous package offer to the union. CCPOA rejected the offer. On September 12, 2007, the state made modifications and gave the union its last, best, and final offer. Salaries and the three-year term remained the same, but changes to activist release time and state vice-president release time were not included. CCPOA rejected the offer on September 17, 2007, and the state implemented it the following day. Salaries were included in the implementation plan, but the three-year term, SVPL, and the release time provisions were not. No violation was found based on the charge that the August 22 package offer and the September 12 last, best, offer contained a three-year term, but the September 18, last, best, offer that was implemented did not. The DPA cover letter asserted that the state exercised its right to implement all three years of its last, best, offer, but only as indicated on the attached implementation table; the offer was also subject to legislative funding of expenditures. Since the

three-year duration clause was not noted on the implementation table, and the legislature did not fund any expenditures in the LBFO-implemented terms, neither condition for multi-year implementation was met. No violation was found based on the allegation that the August 22 package offer proposed the rollover of activist release time without change, but the September 18 implemented terms did not include this as part of the implementation plan. Elimination of the activist leave was not reasonably comprehended within the state's last best offer, however, a subsequently negotiated union paid leave agreement operated as a waiver. The union paid leave agreement covered activist release time. The language of the waiver clause and other terms of the union paid leave agreement are clear and unambiguous. Extrinsic evidence of bargaining history cannot deviate from the plain meaning of the agreement.

State of California and Peace Officers of California and California Statewide Law Enforcement Assn., Case SA-SV-171-S. ALJ Shawn P. Cloughesy. (Issued 03-26-2010, exceptions due 04-26-10). On August 20, 2008, the Peace Officers of California filed a petition to sever a group of state employees, designated under the Penal Code as peace officers, from existing state unit 7 (Protective Services and Public Safety). The proposed unit at the time the petition was filed included 2,656 state employees. POC contended that it had a right to a peace-officer-only unit. However, POC failed to show that the different interests of sworn and non-sworn job classifications have created an unstable bargaining situation, and it did not rebut the presumption that the existing unit is more appropriate than the proposed unit.

Oakland Regional Office — Decisions Not Final

SEIU-United Healthcare Workers West Loc. 2005 v. West Contra Costa Healthcare Dist. and National Union of Healthcare Workers, Cases SF-CE-641-M; SF-CE-648-M; SF-CO-201-M; SF-DP-281-M. ALJ Donn Ginoza. (Issued 03-01-10; exceptions filed 03-22-10.) Following imposition of trusteeship over numerous healthcare unit locals in California, Service Employees International Union expelled dissident officers and staff, resulting in the establishment of the National Union of Healthcare Workers. NUHW then initiated a number of decertification campaigns against the international. In the

mail-ballot election held by PERB at the district's San Pablo hospital, NUHW prevailed by a wide margin. SEIU-UHW, the incumbent local, filed election objections and two unfair practice charges against the district, alleging denial of access and preferential support. SEIU also filed an unfair practice against NUHW for circulating a flyer advising voters to return their ballot to an NUHW steward rather than mailing it themselves. As the incumbent and party to an expired MOU, SEIU-UHW retained access rights to employee break rooms in non-public areas of the hospital. Due to complaints from employees favoring NUHW, the district issued "neutral" groundrules that limited both unions to the hospital's public areas. Because the district immediately retracted the access restriction as to SEIU-UHW, its unilateral change allegation was dismissed. SEIU-UHW also failed to substantiate allegations that the district unlawfully changed policy by imposing an escort requirement for its organizers when accessing break rooms, or by requiring them to sign a visitors book and wear a name tag worn by outside vendors when accessing the non-public areas of the hospital. Though the sign-in and badge requirements were changes implemented without notice, they had no adverse impact on SEIU-UHW's access rights. The allegation that the district granted preferential support to NUHW by failing to police public areas, the restriction as to NUHW representatives was also rejected because SEIU-UHW was given superior access to break rooms. At best, better policing only would have resulted in lesser access for NUHW. Although the badges subjected SEIU-UHW organizers to ridicule from NUHW supporters for appearing to be vendors, neither that consequence nor any other district actions had a tendency to influence employee free choice. Therefore, no preferential support violation was established. NUHW's election advisement did not interfere with employee free choice because the misstated mailing instruction was immediately retracted by a corrected flyer and a subsequent all-unit mailing that explicitly pointed out the error. None of the conduct by the district or NUHW, separately or cumulatively, impacted the vote or had the natural and probable consequence of doing so. Therefore, the election objections were overruled, and NUHW was ordered certified as the exclusive representative.

Los Angeles Regional Office — Decisions Not Final

Salas v. City of Alhambra, LA-CE-513-E. ALJ Ann L. Weinman. (Issued 01-25-10; exceptions filed 02-19-10.) An employee was discharged days before his probationary period was to expire. This occurred on the same day he participated in a meeting during which he criticized his supervisor on behalf of himself and his crew. The employee had no prior problems, and received two good evaluations and step increase in wages. The city failed to provide a legitimate reason for the discharge. The employee was unlawfully discharged in retaliation for protected activities.

Lake Elsinore Teachers Assn., CTA v. Lake Elsinore Unified School Dist., Case LA-CE-5235-E. ALJ Thomas J. Allen. (Issued 02-24-10; exceptions filed 03-16-10.) There was no finding of retaliation against the association bargaining team member who was non-reelected. The weight of evidence showed the probationary teacher's non-reelection was based on his failure to support the district's co-teaching approach to special education, not on his association activities.

Carpinteria Association of United School Employees and Hotchner v. Carpinteria Unified School Dist., Case LA-CE-5045-E and LA-CE-5135-E. ALJ Ann L. Weinman. (Issued 03-09-10; exceptions due 04-12-10.) Consolidated cases allege the school district retaliated against the union site-representative and made statements to employees that interfered with their statutory rights and those of their union. Nearly all of the district's statements were in violation of EERA.

Report of the Office of the General Counsel

Injunctive Relief Cases

Two requests for injunctive relief were filed January 1 through March 31, 2010.

Requests denied

Riverside Sheriffs Assn. v. County of Riverside (IR No. 580, Case LA-CE-594-M). On February 24, 2010, the union filed a request for injunctive relief to prohibit the county's implementation of terms and conditions relative to various probation officers. On March 1, the board denied the request.

AFSCME Loc. 512 v. County of Contra Costa (IR No. 581, Case SF-CE-725-M). On March 11, 2010, the union filed a request for injunctive relief to prohibit the county from hiring temporary workers in the county's Department of Employment and Human Services. On March 16, the board denied the request.

Litigation Activity

Two new cases were opened January 1 through March 31, 2010.

County of Riverside v. PERB; Brewington, California Court of Appeal, Fourth Appellate District (Division Two (Riverside)), Case No. E050056. (PERB Case No. LA-CE-261-M.) In January, the county filed a writ petition with the appellate court alleging the board erred in PERB Dec. No. 2090-M.

California Nurses Assn. v. PERB; University of California, California Court of Appeal, First Appellate District (Division One), Case No. A127766. (PERB Case Nos. SF-CE-762-H, SF-CO-124-H.) In March, the union filed a writ petition with the appellate court alleging the board erred in PERB Dec. No. 2094-H.